Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 662

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., ET AL.

No. 663

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., ET AL.

No. 664

CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

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Mr. Waller:

Q. You were not trying to sell Lawing in those other towns were you?

A. No, Lawing had nothing to do with those towns.

Q. He only had a theatre in Brownsville?

A. That is all.

Mr. Waller: We ought not to delay the Court on account of these papers, which are on the way here.

The Court: You can recall him when the records arrive.

Mr. Waller: There is some other correspondence that we have stipulated with the Government about, that could be [fol. 1601] brought in at this time. We will also stipulate that Mr. Kessnich is here but he is ill and unable to come into court and we will have the same stipulation.

Mr. Wright: All right. The first letter we are offering is written by Mr. Kessnich, dated July 25, 1935, to Mr. H. Postman at the Home Office, Re: Brownsville, Tennessee.

The Court: What exhibit is that?

Mr. Wright: It has not been numbered yet.

The Court: All right, read it then you can have it numbered. What number will it be.

The Clerk: No. 169.

Mr. Wright: We have a stipulation, I believe, if he were called he would testify, at the time he wrote this letter, he was Southern District Manager for Metro-Goldwyn-Mayer and that he wrote the letter in the course of performing his duties as such Manager. The letter reads as follows: (Reading):

> "Memphis has sold a contract for Brownsville, Tennessee.
>
> You had better hold up approval of this contract [fol. 1602] until we get into our negotiations with Sudekum, for the reason that Sudekum has also gone into Brownsville with an opposition theatre to our present account in Brownsville."

[fol. 160] There is a stipulation that Mr. Postman was employed as contract clerk at the home office when he received this letter.

The next letter is dated November 4, 1937 from Mr.

Kessnich to Mr. T. J. Connors at the home office, which carries the same or a similar stipulation. It reads:

"Dear Mr. Connors:

"I closed a deal with Tony Sudekum for his 22 situations for the Sudekum Junior Circuit of 24 situations. I am not at all pleased that I could not improve the deal, but I am frank to tell you if I had not closed the deal with Sudekum at the time I was there, I am afraid we would have been out of the situations because, as I pointed out to you on the telephone, Sudekum was insisting on a blanket reduction of 20% in all of his situations and he showed me box office statements in many of his theatres that proved conclusively that his grosses were substantially off." • • •

And the next paragraph simply recites the negotiations that were going on. I don't think I need to read all of it at this time. I will go down to the next to the last paragraph, in which he says:

"Sudekum doesn't operate in big towns, as you probably know. The majority of his situations are the smaller type operations, with the exception of [fol. 1604] Decatur, Bowling Green, Gadsden, Hopkinsville, and Kingsport. The Sudekum Junior Circuit, or Stengel situations, are the smallest towns in the Tennessee territory and in those situations Sudekum showed me box office statements on our pictures, United Artists pictures, etc., showing that many pictures only gross $5.00, $7.00, $8.00 and $10.00 per day." • • •

There is more of the letter but that is the only part that we regard as significant.

(Letter filed as Government's Exhibit No. 170.)

And I believe that that is all from Mr. Kessnich. Now Mr. Connors, is he going to appear?

Mr. Waller: Yes.

Mr. Wright: Are there any others stipulated besides Mr. Kessnich?

Mr. Waller: Mr. Postman.

Mr. Wright: A letter from Mr. McGuire dated February 20, 1938 is written to Mr. Roy M. Avey, manager of Loews

office at Atlanta. The stipulation on this is that at the letter was written Mr. McGuire was employed as salesman [fol. 1605] in the Atlanta branch of Loews and that he wrote this letter on that date in the course of performing his duties as salesman and that it was duly received by Mr. Avey. The letter reads as follows:

"Dear Mr. Avey:

"Answering your office memo of the 16th, I have noted copy of Mr. Andy Anderson's letter to you dated the 11th together with your reply dated 16th, and you are in error as to Mr. Anderson having more product features under contract that he can use. He wanted to contract for about twenty of current and same number of 36-37 feature product second run in Hopkinsville, and naturally wanted the big ones and his prices ran from $12.50 to $15.00 top including score. I told him I did not even have cut-offs as his town was an office account and I did not know whether second run had been sold or not, but would contact office and have office take up direct with him. Would use a like number of shorts and one and two reel subjects paying $2.00 a reel, altho he claimed most of companies selling him second run for $1.50 per reel."

I would like to have that filed with the next Government's number.

(Letter filed as Exhibit No. 171.)

The first letter from Mr. Postman dated August 1st, [fol. 1606] 1935, is addressed to Mr. J. F. Willingham at the Memphis exchange. The stipulation with reference to this letter is that Mr. Postman, if called to the stand, would testify that he was on that date employed as contract clerk in the New York office of Loews, Inc. and that he wrote this letter on that date in the course of performing his duties and that it was duly received by Mr. Willingham. The letter reads as follows:

"Dear Mr. Willingham:

"Mr. Kessnich has asked me to acknowledge your letter of July 30th addressed to him regarding the 1935-1936 contract submitted for Southland Theatre, Brownsville, Tennessee, and the Strand Theatre, Whiteville, Tenn.

"Mr. Kessnich suggested that we withhold action on these contracts for a few days and when we hear from him will advise you further."

We ask that that be given the next Government number.

(Letter filed as Exhibit No. 172.)

The next letter is dated August 20, 1935 and it is from Mr. Postman to Mr. Willingham and carries a similar [fol. 1607] stipulation.

"Dear Mr. Willingham:

"With further reference to our letter of August 1st we are returning herewith, unapproved, applications for contract submitted for the Southland Theatre, Brownsville, Tenn. and the Strand Theatre, Whiteville, Tenn.

"Discussed this matter with Mr. Kessnich yesterday and he suggested that you hold these contracts in your desk until you hear from Mr. Sudekum regarding the 1935-1936 deal at which time final disposition can be made of these applications."

I ask that that be given the next number.

(Letter filed as Exhibit No. 173.)

The next letter is dated December 31, 1937 and is from Mr. Postman to Mr. Kessnich and carries a similar stipulation:

"We received Sudekum contracts yesterday and approved all of them with the exception of the Roxy Theatre at Gallatin, Tennessee. According to our records, we have sold the New Palace Theatre in this situation for many years and neither Mr. Connors nor the writer recalls your having mentioned it when we discussed the Sudekum deal generally. The terms of the Roxy Theatre are not as good as the terms we had [fol. 1608] last season for the New Palace Theatre both on features and shorts but Mr. Connors requests that we withhold action on the contract pending receipt of further advice from you as to reasons for not continuing with our old customer in this situation."

Please give that the next Government number.

(Letter filed as Exhibit No. 174.)

The Court: This witness may now stand aside to be recalled later when your papers come.

Mr. Wright: I expect, your Honor, that we might take this opportunity to dispose of Mr. Avey.

The Court: All right, call Mr. Avey.

Mr. Waller: Here are the papers now.

Mr. Wright: I think we might as well finish with Mr. Willingham.

The Court: Well, let Mr. Avey retire a few minutes and call Mr. Willingham back.

[fol. 1609] J. F. WILLINGHAM, Witness for the Plaintiff, resuming the stand, testified as follows:

Cross-examination (Continued).

By Mr. Waller, for the Defendants:

Q. Now, Mr. Willingham, I asked you about a letter that you wrote to Mr. Connors on May 28, 1935, which has been filed as Defendants Exhibit 51. I will ask you if you received a reply to that letter from Mr. Connors, dated June 3, 1935, and if you now have that with you?

A. Yes, sir.

Mr. Waller: We offer this letter as Defendants Exhibit No. 52.

(Letter marked as Defendants Exhibit No. 52.)

(Reading:)

"This will acknowledge receipt of your letter of May 28th, outlining your activities for week ending May 25th.

We note that in Brownsville, Tenn., exhibitor contends he cannot pay as much as last year due to the fact that Tony Sudekum has come into his town and opened a theater.

The thought occurs to me that it might be advisable to sell our product to Mr. Sudekum in this situation

if you are unable to secure a satisfactory deal from [fol. 1610] the Southland Theater.

Suggest you discuss this with Mr. Kessnich and that you jointly decide where our interests would be best protected.

We are very much interested in your report as to the situation at Milan, Tenn., and after you have discussed the situation with Mr. Sudekum we would like to have a further report as to Mr. Sudekum's instructions to Mr. Pouncey."

The rest of it is about other situations. Now, Mr. Willingham, in May, 1935, had you agreed with Mr. Lawing on reducing the terms of his existing contract with Metro; do you find a memorandum or document dated May 17, 1935 in your files relating to that?

A. Yes, sir, this is the reduction.

Q. There was a reduction made in the terms of Mr. Lawing's contract, that is, in his film rentals, pursuant to this memorandum?

A. What is the question?

Q. I say, was there actually a reduction made in the terms of Mr. Lawing's contract, that is, in his film rentals, pursuant to this memorandum?

A. It is actually reduced there in that alteration contract.

[fol. 1611] Q. I mean, this sets forth what was actually done?

A. Yes, sir.

Mr. Waller: We offer this as Defendants Exhibit 53.

(Marked Defendants Exhibit No. 53.)

Q. I will ask you if you find a letter of June 6, 1935 that you wrote to Mr. Lawing with reference to that reduction in his terms?

A. Yes, sir.

Mr. Waller: We offer this as Defendants Exhibit No. 54.

(Marked Defendants Exhibit No. 54.) Being a letter dated June 6, 1935:

"Mr. C. G. Lawing, Southland Theater, Brownsville, Tenn.

DEAR MR. LAWING:

We are very happy to advise our Home Office has approved our recommendation that you be granted the following reductions:

Regular releases on the 1934-35 product have been reduced from $12.50 film rental to $10.00 film rental, plus $3.00 score.

The $20.00 flat rental specials have been reduced to [fol. 1612] $15.00 film rental, plus $3.00 score.

We sincerely hope this reduction will materially aid you in the profitable exhibition of our product.

Sincerely, Metro Goldwyn Mayer Dist. Corp.,
J. F. Willingham, Branch Manager."

The Court: What is the date of that letter?

Mr. Waller: June 6, 1935.

The Court: What years does that refer to, 1935-1936 or 1934-1935?

A. 1934-1935.

Mr. Waller:

Q. At that time Mr. Lawing was playing the 1934-1935 product?

A. Yes, sir.

Q. I will ask you if you find in your file a letter that you wrote to Mr. Lawing sometime after this reduction was made, namely, a letter dated August 28, 1935?

A. I have one here.

Q. May I see it. (Letter handed to Mr. Waller.) Now, [fol. 1613] was this a registered letter sent with return receipt requested?

A. Yes, sir.

Mr. Waller: We offer the letter and the return receipt as Defendants Exhibit 55. (Marked Defendants Exhibit No. 55.) This being dated August 28, 1935:

"Mr. C. G. Lawing, Southland Theater, Brownsville, Tenn.

DEAR MR. LAWING:

Inasmuch as our Booking Department has made numerous requests for feature dates, which requests have been to no avail, we are making the following

bookings, setting up arbitrary dates, according to the terms of your contract. The bookings are as follows:

One New York Night	Sept. 12-13
Baby Face Harrington	Sept. 19-20
Reckless	Sept. 26-27

Sincerely yours, Metro Goldwyn Mayer Dist. Corp., J. F. Willingham, Branch Manager."

[fol. 1614] Q. Was it true that Mr. Lawing had ignored request for dating your product in accordance with your contract?

A. Yes, sir.

Q. Did you find in your file a letter which you wrote to Mr. Lawing on October 25, 1935, in regard to his 1934-1935 contract?

A. Yes, sir.

Mr. Waller: We offer this as defendants' exhibit 56, being a letter dated October 25, 1935, to Mr. C. G. Lawing, Southland Theatre. It is as follows:

"The writer has just reviewed your account and finds it to be in a most deplorable condition. I never realized until now that you are absolutely ignoring our product and not giving us any dates whatever.

"Attached is notice of availability for features and short product and if there is another account in the United States in a worse condition, we would like to know just who it might be.

"We are going to insist that you give us dates in abundance, playing two pictures per week in Brownsville, starting immediately, in order to catch up as you are so far behind this will be the only possible way [fol. 1615] you can catch up on your playing arrangement.

"The writer was under the impression you told me last week while here in Memphis that you had dated our product, but from the looks of the attached notice of availability, evidently some one was in error.

"When you come to Memphis Sunday or Monday or next week, would like to have a personal, heart to heart talk with you.

"Sincerely, Metro Goldwyn Mayer Dist. Corp.,
"J. F. Willingham, Branch Manager."

Q. Mr. Willingham, were the statements of fact contained in that letter true at the time you wrote the letter?

A. Yes, sir.

Q. Do you find in your file any record as to the condition of Mr. Lawing's account, that is with reference to your 1934-1935 product, at the time he closed his theater in 1936, that is as to whether or not he complied with his contract by playing off the pictures?

A. You have reference to a cancellation of unplayed product?

Q. Yes, and do you have some letter you wrote to him listing the product, features he had not played, cancelling them, something of that kind? May 22, 1936?

A. Yes, that is the letter.

[fol. 1616] Q. Did you on that date write to Mr. Kessnich?

A. No, sir, Mr. Sudekum.

Q. This is a letter of May 22, 1936, to Mr. Kessnich, which refers to a list which is attached; I want the list, if you have it?

A. I do not have the list.

The Court: He says he does not have it.

Mr. Waller: Do not have a list of unplaid product? The unplayed records?

A. I have an exhibitors record, gives pictures that were not played.

Q. That is what I want to get, the pictures that were not played; that is, how far he was playing his contract with you in May, 1936.

A. I think there are three features that remained unplayed.

Q. Weren't there a number of features that remained unplayed, a good many more than three?

A. Sir?

Q. Weren't there a good many more than three, what about short subjects?

A. Quite a lot of those short subjects and news reels, but only a few features that I can see here.

[fol. 1617] Q. What I am asking for is the list attached to your letter of May 22, 1936, if you do not find it there will you attempt to find it for me?

A. Yes, sir, I will. I did not bring it.

Q. All right, sir; now, Mr. Willingham, there has been introduced as Government exhibits 46 at page 776 and page

777 of the transcript a letter that you wrote to Mr. Sudekum on December fifth, 1935, some weeks after your letter of October 25, 1935, to Mr. Lawing, in which you start off with, enclosed you will find contracts for your Capitol theater, Brownsville, Tennessee, in accordance with our long distance conversation yesterday—and at the same time there was marked and offered Government's exhibit L-9, which is a contract between MGM and Crescent for 1935-1936 product, dated December 14, 1935, as I caught it, the inference was the contracts enclosed with the letter of December 5th were actually made, and I want to ask you whether or not those contracts or proposed contracts were rejected by Mr. Sudekum and *and* a new contract originated which was then made between Crescent and MGM after December 5, 1935?

A. Rejected by Mr. Sudekum?

Q. Yes, that is the contracts were not enclosed in your letter to Mr. Sudekum of December fifth, 1935; did you find where Mr. Sudekum wrote you a letter and returned these contracts and suggested he wanted a reduction in terms? [fol. 1618] *Q.* I do not have anything like that.

Q. Do you find the letter of the 13th, 1935, that you wrote Mr. Sudekum?

A. Yes, sir.

Q. Sending the revised contracts?

A. Yes, sir.

Q. You have handed me your letter of December 13, 1935, to Mr. Sudekum, which we will offer as defendants' exhibit No. 57.

Mr. Wright: You are not offering the letter of May 22, 1936?

Mr. Waller: Not offering that. The letter reads as follows:

"December 13, 1935, Mr. Tony Sudekum, Crescent Amusement Company, Nashville, Tennessee.

Dear Mr. Sudekum:

"In accordance with telephone conversation which you had with Mr. Kessnich today we are attaching hereto feature contract for Brownsville, Tennessee, which carries the prices enumerated in your letter to us dated December 5th. You already have contracts for one reelers, two reelers, trailers and News reels.

"We shall appreciate your signing all of these con-

tracts and returning at your earliest convenience along [fol. 1619] with contracts for Dyersburg, Union City and Paris.

"Yours truly, Metro Goldwyn Mayer Dist. Corp.

"J. F. Willingham, Branch Manager."

Mr. Wright: That is a copy of a letter that is already in evidence.

Mr. Waller: No, you introduced a letter of December fifth, not the letter of December thirteenth.

Mr. Wright: No objection.

Mr. Waller:

Q. Does that refresh your recollection, that the actual contract for feature pictures was not made with Mr. Sudekum until after December 13, 1935?

A. The best of my knowledge that application, took one application, we only took one application, and that was at that time with Mr. Sudekum.

Q. Prior to the time that Mr. Sudekum's theater was opened in Brownsville, had you had trouble with Mr. Lawing in regard to playing product? I will ask you to refresh your memory, if you can find in your papers there a letter you wrote to Mr. Connors on January 16, 1933, also a letter you wrote to Mr. Connors on August 15, 1933; do you find [fol. 1620] those two letters?

A. Yes, sir.

Q. This letter covers a number of other situations besides Brownsville, does it not?

A. Yes, sir, they cover several.

Q. In place of offering these letters in evidence, will you read what you said in each of them about Brownsville or permit me to read it?

A. Yes, sir.

Q. Your letter of January 16, 1933, letter to Mr. Connors covering your activities for the week ending January 14th,

"Brownsville, Tennessee, this exhibitor had refused to date our product, due to his receipts not justifying rentals. We adjusted his contract, giving him reductions, and we are forwarding them on to New York today for your approval, which is the only way we could liquidate our contract. The reductions requested by the exhibitor are fair and we believe you will allow them, as they do not amount to a great deal of money."

Now the letter of August 15, 1933:

"The Southland Theater, Brownsville, Tennessee, the exhibitor is overbought and advises that he is not in a position at this time to buy any product whatever."

[fol. 1621] Q. I will ask you, Mr. Willingham, if that refreshes your recollection, and if it was not true that you were having trouble with Mr. Lawing as far back as 1933?

A. The letters speak for themselves, we had trouble with him.

Q. Do you recall that in 1933 and 1934, you also had considerable trouble with Mr. Lawing about dating and playing news reels and other short reels and short subjects?

A. We always had trouble with him about the news reels and short product.

The Court: What exhibitor is that?

Mr. Waller: I did not offer those last two, I only read from them into the record.

[fol. 1622] Q. That is the list that was played at the time in May when Mr. Lawing closed his theatre?

A. Yes sir.

Q. I believe you were correct there were some features and the rest were shorts that he was behind on?

A. Yes.

Q. There was quite a list of short subjects he was behind on?

A. Yes sir.

Q. That was about how long after the end of the 1934-1935 season? The seasons usually close about September 1st)?

A. They start the first of September and run to August 31st.

Q. That would have been August 31, 1935?

A. The product is released up to August 31, 1935.

Q. Mr. Willingham, can you give us a comparison of the film rentals that your Company obtained from Mr. Lawing during the time you were doing business with him and the film rentals you received from Mr. Sudekum during a corresponding period of time after you started doing business with the new Theatre in Brownsville?

A. Yes sir.

Q. Have you made a memorandum from the records, or how do you have that?

Mr. Wright: If the Court please, Mr. Willingham, I believe, has the records with him, which show what pictures [fol. 1623] were played and if he is going to make a comparison, I think he ought to put in the original record.

Mr. Waller: I suggest the records be produced and let him read from his memorandum, unless they insist on having the records. They are pretty hard to understand, unless you know this business pretty well.

The Court: Of course, the records are the best evidence. If he has made up a tabulation from the record I expect his tabulation would be more helpful to the Court than to have to examine the records.

The Court:

Q. Do you have the records here?
A. Yes sir.

Mr. Waller: They are subject to inspection, of course.
The Court: Why is it difficult to tell from the records?

A. Well, it is quite complicated and rather hard to go through all this information because of the——

Mr. Waller: I think Mr. Wright knows how to interpret those records a lot better than I do.

Mr. Wright: We asked in the interrogatories that were [fol. 1624] served upon Loew, just as all the other distributors, for the play-off sheet for Brownsville and these other situations. They reported that because the play-off for that theatre after Lawing took over for the season beginning 1935-1936, they reported that they did not have a contract with Brownsville for the season 1934-1935 and did not furnish us any play-off for Brownsville for 1934-1935 season. Now, I think the proper way to handle this is they furnish us all the play-off for the 1934-1935 season, along with the other four seasons which they did furnish. Apparently there was some oversight there in not preparing the 1934-1935 record for Brownsville.

The Court: What period of time does your tabulation cover?

A. 1932-1933 season up through 1938-1939, both theatres, Southland and Crescent.

Mr. Waller: Up to when?

A. 1938-1939 season.

Mr. Raftery: In all probability, your Honor, what Mr. Wright refers to is that while they were still defendants, these interrogatories were propounded, but the answers were not made; isn't that right? You left them out of the case.

[fol. 1625] The Court: They got all the years except 1934-1935, I understood.

Mr. Raftery: Every time a picture is played off, whether a feature or short, he has got a book keeping entry, and what he had done is to make a compilation of all the book-keeping entries, and the suggestion of Mr. Waller is that he turn over to Mr. Wright all of those records, so that they can check the accuracy of the compilation.

Mr. Wright: We are entitled to examine the records, they don't speak for themselves. It is rather complicated, as they have already suggested.

The Court: Let the records be filed and he can testify from his compilation, and it can be checked against the records.

Mr. Waller:

Q. How many of those books of records are there?

A. A book for each year.

Q. What else?

A. We have an exhibitor's record and play-off record that shows the date it was played.

Q. Then you have a play-off record for each season?

A. Yes.

Q. That will be 14 documents all together?

[fol. 1626] A. Yes.

Q. Will you file those——

The Court: What is it you want to prove by this, Mr. Waller?

Mr. Waller: I want to prove MGM got a great deal more money out of the Crescent Amusement Company at Brownsville than they ever did out of Lawing; they had a right to select their customer and had a very good business reason for contracting with Mr. Sudekum instead of Mr. Lawing.

The Court: Don't you have a record that will show the

amount at the end of the season, rather than putting in a daily, or weekly, or monthly bookkeeping record?

Mr. Waller: That is what I thought we could do.

The Court: Do you have any records of the Company that will show the amount at the end of each season?

Mr. Waller: I don't know; I will just ask the witness?

A. Our Office Manager compiled this list from the actual records and books in the office and sent it over to us.

The Court: If the Government insists on the books they have a right to have them.

Mr. Waller: The ordinary procedure, I have this in a number of instances, the ordinary procedure in instances [fol. 1627] of this kind is to permit the witness to testify from the tabulation, then be cross-examined from the original records without encumbering the record with the original records.

The Court: The original records, we haven't got them here.

Mr. Waller: They are here?

A. They are the Exhibitor's record cards.

Mr. Waller: We can put them in, if your Honor wants them.

The Court: All right, put them in evidence.

Mr. Waller: We offer them in evidence, at the suggestion of the Government as Defendants' Collective Exhibit L-7.

A. Do you want this compilation with them?

Mr. Waller:

Q. I want you to read the compilation.

A. The Play-off of the Southland Theatre is as follows:

Season 1932-1933, Total	$66.77

The Court: What season is that.

A. The seasons 1932-1933.

Season 1933-1934	$1124.80
Season 1934-1935	1086.69

Q. All those were with Mr. Lawing?

[fol. 1628] A. That is the Southland Theatre with C. G. Lawing. Crescent Amusement Co. Theatre, 1935-1936, they secured—

Season 1935-1936, Total	$1596.95
Season 1936-1937, Total	1604.20
Season 1937-1938, Total	1645.38
Season 1938-1939, Total	1730.67

Q. Will you file this tabulation as——

Mr. Waller: We offer it in evidence as Defendant's Exhibit No. 58. May I have the other correspondence?

Q. Mr. Willingham, I want to call your attention to Government's Exhibit No. 173, which is a letter to you from Mr. Postman dated August 20, 1935, and referring to the unapproved applications submitted for the Southland theatre at Brownsville, Tennessee, and Strand Theatre at Whiteville, Tennessee, in which it is stated that Mr. Kussnich suggested that you hold these contracts in your desk until you hear from Mr. Sudekum regarding the 1935-1936 deal, at which time final disposition can be made of these applications. Those are the applications that you took after your salesman had taken some that you had rejected?

A. Yes sir.

Q. Did you hold these applications in your desk, as suggested in this letter from Mr. Postman?

A. Yes sir.

[fol. 1629] Q. Did you continue to hold them in your desk until sometime in November or December, 1935?

A. I think the correspondence proves that, doesn't it?

Q. I think it does, but I can't find the letter I am thinking about.

The Court: Which letter is it you refer to? No. 173 is the one which he held?

Mr. Waller: No. 173 is the one he held.

Q. Well, didn't you hold them?

A. December 5, 1935, yes.

Q. Did you write a letter in which you sent those exhibits on and asked that they be borne in mind when they were dealing with Sudekum, sometime in November? I recall some such exhibit as that, but regardless of that, you

did hold those applications until the Sudekum deal was approved or about to be approved?

A. Yes sir.

Q. So there were only two applications that were taken from Lawing, one by the salesman and one by you?

A. That is all I remember having been taken.

The Court: Mr. Willingham, on December 21, 1937, Mr. Postman wrote you a letter to the Roxey Theatre at Gallatin?

A. No sir, not me.

The Court: That is right, he wrote Mr. Kussnich.

[fol. 1630] The Court: Is Mr. Kessnich going to testify?

Mr. Armistead: He is sick today, your Honor.

Redirect examination.

By Mr. Wright:

Q. You were subpoenaed as a witness on behalf of the Government, were you not?

A. Yes sir.

Q. When did you get to town?

A. I got in here last Saturday afternoon.

Q. And you were accompanied by your attorney, Mr. Nusbaum?

A. No, I came from Memphis, Tennessee.

Q. What did you do when you got here? Who did you get in touch with?

A. No one. I went up to the room.

Q. Did you make any effort to get in touch with any representation of the Government?

A. No sir. I was instructed to get in touch with the Government in Room 245 at 9:30 a. m. Monday.

Q. And did you get in touch with any of the other attorneys in this case?

A. What do you mean?

Q. Did you talk to them or see them?

A. Well, I saw Mr. Waller.

[fol. 1631] Q. When was that?

A. Monday, I think I met him, or Sunday night at dinner. I wasn't—I didn't have dinner with him, however.

Q. And did you talk to any of the other attorneys in the case there?

A. Sir?

Q. Did you talk to any other attorneys for the parties in the case?

A. I didn't talk about the case but I met Mr. Miller of RKO.

Q. And did you discuss your testimony with Mr. Waller?

A. No sir, I did not.

Q. Who instructed you to produce the document that you brought with you today?

A. Our attorney from New York.

Q. Who was that?

A. Mr. Nusbaum.

Q. When did Mr. Nusbaum instruct you to do that?

A. Well, these—you mean this resume here?

Q. I mean all of this correspondence that you brought here and the records going back to 1933 and 1934?

A. When did he instruct me to do it?

Q. Yes.

A. Well, that was done, I think, about a week ago or more.

Q. And sometime prior to that you had been asked to forward correspondence to New York, hadn't you, that had anything to do with this suit?

[fol. 1632] A. Not that I know of. I don't understand that question.

Q. I say sometime prior to the time you assembled this correspondence, which you say was last week, you had been instructed to assemble and forward correspondence subsequent to January 1, 1934 that dealt with this case to the New York office pursuant to a subpoena that was served upon the Company?

A. Yes sir, we sent it up there.

Q. Did you send up what you produced here?

A. We sent up everything but this break-down of that. We didn't send that.

Q. I am not talking about the break-down. I am talking about the correspondence you brought with you to court today.

A. I think so. I am not positive because I didn't handle it. One of the clerks in the office handled that.

Q. Then when did you get it back here?

A. Well, I remember shipping it over here last Friday.

Q. Then you took it out of your files at the exchange?

A. At the exchange, yes sir.

Q. You never had sent it to New York, isn't that right?

A. Sure. I imagine everything that New York asked for we sent up there long ago.

Q. When was that?

A. You will have to ask our counsel; I don't remember. That is quite sometime ago.

Q. And who was it that asked you to have this tabulation made up that has been identified here as Defendant's [fol. 1633] Exhibit No. 58?

A. Our counsel.

Q. You are again referring to Mr. Nusbaum?

A. Yes.

Q. Did he tell you what he wanted to use it for?

A. Yes sir.

Q. Did you discuss this tabulation with Mr. Waller or any of the attorneys for the defendants in the case?

A. No, I did not.

Mr. Armistead: May it please the Court, I don't see where these questions are material. Certainly a witness has got a right to discuss with counsel on either side.

Mr. Waller: Your Honor, I had lunch with this gentleman and his associate yesterday and I talked to him about five minutes about the case, the only time I have ever mentioned it to him. All my contacts have been with his counsel.

The Court: I don't know that it is reprehensible for you to talk to him.

Mr. Armistead: I didn't know it was a crime, may it please the Court, for counsel representing a defendant in an antitrust case, to talk to any witness.

[fol. 1634] Mr. Waller: I haven't discussed the case with him since he was on the witness stand, your Honor.

Mr. Armistead: It is getting so I am afraid to put a newspaper in my pocket—they will ask me what I have got there.

By Mr. Wright:

Q. It is a fact, Mr. Willingham, is it not, that Mr. Nusbaum instructed you not to talk to counsel for the Government, is that right? He refused to permit you to talk to me, is that correct?

Mr. Waller: I object to that unless he points out that request was made after his cross-examination had started.

Mr. Wright:

Q. Just answer my question.

Mr. Waller: I was familiar with what happened. During the cross examination counsel for the Government wanted to talk to him. They ought to talk to him before they put him on the stand, your Honor.

The Court: Overruled. Go ahead and answer the question.

A. Ask the question over, please.

[fol. 1635] Mr. Wright:

Q. I say it is a fact, isn't it, that Mr. Nusbaum instructed or refused to permit you to confer with me or any other counsel for the Government about your testimony in the case?

A. That was last night about 8:30, yes.

Q. Well, you didn't make any effort and Mr. Nusbaum didn't instruct you to communicate with me or any other Government counsel before you took the stand, is that not right?

A. I don't know what he instructed about that. I was told to report here to room 245 and did it.

Q. Now, this tabulation, you say, was prepared by your office manager?

A. Yes, sir.

Q. When?

A. About eight days ago or nine.

Q. Now, prior to that time you- exchange prepared, did it not, pursuant to instructions from the home office, these tabulations that are shown you of the play-off of the MGM contract for the 1935-36 season through 1938-39, inclusive, for Brownsville?

A. Yes sir.

Q. Who prepared those?

A. My office force.

Q. Now, this tabulation for the 1935-36 season, that was previously prepared and submitted to the Government in answer to its interrogatories, shows a total of thirty seven feature pictures played during that season by the Capitol [fol. 1636] Theatre of the Crescent Amusement Company at a total rental of $775.00?

A. Yes sir.

Q. Now, the tabulation you just identified as Defendant's Exhibit No. 58 shows forty six features played off for the same season and the total rental was $1021.95. Now, can you tell us the explanation of that discrepancy?

A. Well, this appears to be the actual play-off (indicating one paper), and this seems to appear to me as the actual amount of the contract at the time it was sold them. Some of the pictures we didn't produce, I suppose, that year. That is the amount of the sale.

Q. This tabulation that was identified as Defendant's Exhibit No. 58 contains the projected figures based on looking at the contracts rather than what was actually paid, is that correct?

A. I believe that that is the actual amount of money or amount of the face value of the contract at the time it was sold, and I think that is the actual play-off. Now, possibly some of the pictures were not produced and released and naturally couldn't be played off.

Q. I am showing you these tabulations here for the 1935-1936 season with your company, as previously produced. It appears, does it not, from that tabulation that nine features that you sold on the 1934-1935 contract weren't actually released during that season but were subsequently [fol. 1637] released during the 1935-1936 season, is that correct?

A. Yes sir.

Q. Mr. Lawing couldn't very well play the pictures on this 1934-1935 contract in his theatre before they had been released, could he?

A. No sir, he could not.

By the Court:

Q. You mean to say that this compilation that you have filed here as Exhibit No. 58 for the years 1935-36, 1936-37, 1937-38, and 1938-39 relative to the Crescent house in Brownsville does not actually represent in dollars and cents the amount that MGM received from the Crescent Amusement Company under its contract for those years but just the face value of the contract?

A. That is my opinion of it. I didn't compile the figures.

Mr. Waller: I understood him to say the pictures may have been counted in the tabulation for one year and the money was actually received in the next year. There is

no duplication. In other words, they didn't take the same money and put it in two years but the contract may have been one season and the money was coming in the next season. In other words, if you add it all together it makes the same result; it is just a question of which year he put it in.

A. You see, he had nine pictures there carried over from [fol. 1638] 1934-1935 to 1935-1936.

The Court: I didn't understand it that way.

By Mr. Wright:

Q. These records that have been introduced as one collective exhibit here are the records which show the——

By the Court: Mr. Wright, if you will excuse me just a minute, please; I want to get this straight.

Q. Do you mean to say then for the years or seasons 1935-1936, 1936-1937, 1937-1938 and 1938-1939 that MGM received from Crescent at Brownsville the total amount of those figures for each year?

A. That was according to my opinion, your Honor.

Q. I am not asking for your opinion.

A. Well, I didn't compile the figures. That is the total amount of the contract at the time we made the contract but sometimes we carry over a picture from one year to the next, which will go in the collections of the particular year that is released in. It all sums up to the same thing, that you have carry-overs.

Q. Well, do you say there are any carry-overs now from those years and the company has actually collected all those amounts?

A. For the last two or three years we haven't had any carry-overs, two or three years; I am not positive whether it is three or not but I know for two years we didn't have [fol. 1639] any carry-overs. We got through releasing pictures on August 31st and that product is complete then. That is the total amount of the contract in dollars and cents at the time we entered into it.

Q. Has that been collected, is what I want to know, that amount?

A. If the pictures were made it has been collected.

Q. I am not asking if they were made; has this amount been collected, is what I want to know.

A. The amount actually collected was over here on this piece of paper. That is sales over there.

[fol. 1640] Mr. Wright: I move to strike Defendants Exhibit No. 58.

The Court: I sustain the motion.

Mr. Waller: I think the witness is wrong about that.

The Court: He may be, I don't know.

Mr. Wright:

Q. Now, Mr. Willingham, these records which were marked as collective Defendants Exhibit, show the play-off feature pictures under the contract, do they not?

A. Yes, sir.

Q. With the dates on which they were played?

A. Yes, sir.

Q. The dates on which they were released?

A. Not released; shows only their play dates.

Q. Shows only the play dates and shows the actual rentals received?

A. Yes, sir.

Q. And shows the pictures that were not played?

A. Yes.

Q. It also shows those that were not made?

A. The ones that were not made were just automatically [fol. 1641] eliminated.

Q. These yellow ones relate to short subjects?

A. Yes, sir.

Q. And the white are the feature play-offs?

A. Yes, sir.

Q. Now, this record here, which has for 1933-1934, in the lower right hand corner; that is the play-off record of the Southland Theater at Brownsville for the pictures released during that season?

A. Yes, sir.

Q. And every picture that was released during that season, according to that record, was played there, was it not?

A. No, sir.

Q. Well, which ones were not played?

A. You know, I don't handle these things very often personally; transfers, one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen; that would be transferred

to another card; have you any other card there for 1933-1934.

Q. There doesn't seem to be another card there, unless you can find it.

(Recess.)

[fol. 1642] Resumption After Recess:

Mr. Wright:

Q. Mr. Willingham, were you able to find the other record?

A. Yes, sir.

Mr. Waller: Now, if your Honor please, in regard to the records I think the witness has shown he doesn't know about them. We will get the man who made them to explain them; he will be here in the morning.

Mr. Wright: Well, let's see what he knows about it.

A. It is the 1933-1934 cards.

Q. The 1933-1934 card shows that he played every record released, is that correct?

A. No, sir.

Q. Those that were released were transferred to the other season?

A. Shows that he played all that were released that year except three.

Q. They were cancelled?

A. They were cancelled.

Q. Where is that shown (showing record to witness).

A. I don't see it.

[fol. 1643] Q. Your answer is you don't know where that is shown?

A. Because I don't understand the card.

Q. Well, I move to strike the cards out then, until they have some one here who does understand them.

Mr. Waller: The truth is, we would rather have them explained by the person who made them.

The Court: If you can have them explained, I will sustain the motion until they are sustained.

Mr. Wright:

Q. Mr. Willingham, when you went through your files to check up this correspondence, were you looking for the

application for the 1935-1936 season that was signed; have you those?

A. I have one here and I think the attorney has the other, if he is able to find it.

Q. This application is dated 7/16/35; is this the one that you held in the drawer there?

A. Yes, sir.

Q. And later didn't you go back in and approve the deal and get a later application; that is, the amendment there, I believe?

A. Yes, sir.

[fol. 1644] Q. Well, what was this other application that you were referring to that you said you thought was turned over to your attorney?

A. Some one said something about two or three different applications being taken, and I only remembered two, and I think our attorney has the other one.

Q. Which is this, the first or the second one?

A. I think it is the second one.

Q. Can you find out for us definitely?

A. Yes, sir, I can.

Q. And if you can find the other one, you will produce that for us?

A. Yes, sir.

Q. I will ask to have this application marked with the next Government L exhibit number, and the letter attached dated December 5, 1935, that was the letter that you wrote to Mr. Lawing on that date rejecting the application?

A. Yes, sir. (Marked Gov. Exhibit L-18.)

Q. Now, Mr. Willingham, I show you a letter dated July 1, 1936, from you to Mr. Kessnich, at Atlanta, and ask you if you wrote that letter at or about that date?

A. I did, yes, sir.

Q. And in that letter you made the following statement, did you not: "I know Mr. Lawing personally and know this [fol. 1645] is the party Mr. Sudekum sat down on top of in Brownsville, Tennessee and finally ran him out of town. Mr. Lawing is a very good theater operator but cannot buck such opposition as Sudekum." Is that right?

A. I said that; I wrote the letter.

And further this deponent saith not.

Mr. Waller: Of course, your Honor understands in cross-examining Mr. Willingham, we are not conceding the com-

petency of any of those letters; we are reserving our objection to all of the letters.

The Court: All right.

[fol. 1646] R. M. Avey, called as a witness in behalf of the plaintiff, he having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wright, for the plaintiff:

Q. Please state your name and address, please?

A. R. M. Avey, Atlanta, Georgia.

Q. And your occupation?

A. Branch Manager, Loews, Incorporated.

Q. How long have you held that position?

A. About six years.

Q. I will hand you a letter dated April 8, 1935, signed by you and addressed to Mr. T. J. Connors, Home Office, and ask you if you wrote that letter on that date in the course of performing your duties as Branch Manager?

A. Yes, I wrote the letter.

Q. I would like to have that marked with the next Government exhibit Number. (Marked by the clerk Government Exhibit No. 175).

Q. And I will also show you a letter from you to Mr. T. J. Connors, Home Office, dated August 17, 1937, and ask you if you wrote that letter on that date in the course of discharging your duties as Branch Manager?

A. Yes, I wrote the letter.

[fol. 1647] Q. I will also show you a letter from you to Mr. Postman, Home Office, dated February 16, 1940, and ask you if you wrote that letter on that date in the course of performing your duties as Branch Manager?

A. Yes, I wrote the letter.

Q. I will show you a letter dated November 14, 1940, from you to Mr. Kessnich, and ask you if you wrote that letter on that date in the course of performing your duties as Branch Manager?

A. Yes, I wrote it.

Q. The first letter is dated April 8th, from Mr. Avey to Mr. Connors, and is marked Government Exhibit No. 175; it is a three-page letter; I will read only the parts that I

think are significant. The report for Wednesday, April 3rd says:

> "*Wednesday, April 3rd:* Called to see Mr. Sudekum, made every effort to get him to sign contracts and use our trailers. He told me that our business relations were very pleasant that he was satisfied with our service, that Miss Brockett was satisfied with the manner in which we were dating the accounts and that everything was agreeable, but until the second run matter in Nashville was cleared up, he would not use the trailers or sign the contracts, and when I kept pushing [fol. 1648] him to sign the contracts, he said that he used our product last season without signing the contracts and that he was using them so far this year without signing the contracts, that he did not want the trailers, but if other matters effecting the signing of the contracts were straightened out, he would use the trailers but would not pay as much as the prices originally scheduled for trailers over the circuit. He express-- his expectations of making a deal with us for the coming season, requesting that I be sure and notify Mr. Kessnich that he wanted our product for Brownsville, Tenn., next season."

Then the report of Thursday, April 4th:

> "*Thursday, April 4th:* Miss Mabel Harrison of Crossville, Tenn., was out of town. Drove on to Knoxville, Tenn., and met Mr. McGuire, took him with me to visit Mr. Denton, and made a deal with Mr. Denton for house he is opening in Lennoir City, in opposition to Mr. Parrott. We were unable to sell Mr. Parrott, due to him operating in opposition to Mr. Sudekum in two of his towns. Mr. Sudekum and Mr. Denton have been on a deal with Mr. Parrott for Mr. Denton to take Lennoir City and Mr. Sudekum to take Mr. Parrott's [fol. 1649] other towns. Mr. Parrott was in Nashville this week to see Mr. Sudekum and Mr. Sudekum told me that he did not make a deal with him and was not interested in doing so."

Mr. Waller: May it please the Court, in addition to our other objections, that is obviously hearsay.

The Court: Overruled.

[fol. 1650] Mr. Wright: Next letter, marked Government's Exhibit No. 176, is from Mr. Avey to Mr. Connors, dated August 17, 1937. The report for Wednesday, August 11th, contains the following statement: with reference to Mr. Hill of the Hill or Cumberland Circuit:

> "He then informed me that he merely wanted to learn what he could from each company's representative and make his buying plans afterwards, and that Mr. Sudekum, who owns considerable interest in the Hill Circuit, had requested them not to buy at what he called this early date. He also stated that he doubted if they would make a deal until after the Sudekum deal was made."

Mr. Waller: Is that a conver*d*ation or alleged conversation between Mr. Sudekum and Mr. Hill? If so, it would be hearsay.

Mr. Wright: Conversation between Mr. Avey and Mr. Hill, who was then president of one of the defendants in the case.

Sunday August 15th;

> "Met Mr. Baird this morning and he informed me that Mr. Sudekum had acquired an interest in his thea-
> [fol. 1651] tre but that he was still permitted to do his own buying and booking. Worked with him until noon and met with him again this afternoon. He would not agree to a deal that we thought we should have and stated that he did not believe we were offering him a deal in keeping with the Sudekum Circuit deal of last year and that he thought it advisable to contact Mr. Sudekum, or at least postpone buying our product until a later date."

Mr. Waller: We think that is objectionable also, Your Honor.

The Court: Overruled.

Mr. Wright:

> "In connection with this solicitation I found that Mr. Sudekum has made a concentrated effort during the past season to acquire an interest in every remaining independent theatre in the State of Tennessee. Mr. Earl Hendren, of the Parrott and Hendren Circuit,

who is now affiliated with Mr. Sudekum, told me early in the year that that was what Mr. Sudekum wanted to do and that he, Mr. Hendren, was working the Eastern section of Tennessee in acquiring theatres for Mr. Sudekum. While in Sevierville, Mr. and Mrs. Murphy [fol. 1652] told me that Mr. Hendren made an effort to buy an interest, or all, of their theatre by threatening them with competition unless they sold at the price which Mr. Hendren wanted to pay. This is a method they are pursuing and where they have acquired partnership, such as Lewisburg, which we made earlier in the week, the exhibitors are very bitter but are frightened to raising their voices against Mr. Sudekum. With this condition existing throughout the entire state, the placing of our product is very doubtful until Mr. Sudekum gives the word to buy.--

Mr. Waller: In other words, Your Honor, this witness has conversations with somebody who tells him that Mr. Sudekum is making a concentrated effort to acquire the theaters.

The Court: It is not one person, from that letter, apparently, it is several persons. I think that part of the conversation with Mr. Hendren might be competent, but I do not think that part of it that he finds that Mr. Sudekum is trying to buy up all the theatres in the State of Tennessee. [fol. 1653] Mr. Wright: This is a statement of what he was told Mr. Sudekum wanted to do.

Mr. Waller: That was before Mr. Hendren was affiliated with him, and by no rules of agency could one make declarations to bind a principal, by some one who is to become an agent.

Mr. Wright: It is not before that at all, Mr. Hendren became affiliated with Mr. Sudekum in the fall of 1936, this letter refers to early in the year 1937.

Next number is Government's Exhibit number 177, dated February 16, 1940, from Mr. Avey to Mr. Postman, at the Home Office.

"Dear Mr. Postman: I talked to you yesterday by telephone regarding my negotiations with Mr. Tony Sudekum, Mr. Louis Rosenbaum and Mr. Kermit Stengel. Attached is a schedule showing the number of percentage pictures that we have set up for each town."

Then there is a long discussion of terms, and the third paragraph says:

> "There are a few other things they ask for in connection with a five-year deal, contending that they have [fol. 1654] the same with other extended term deals they have. One is, they want the privilege to a repeat run on any picture and cancel a picture from the 'Balance' group. This, of course, I told them we would not under any circumstances agree to and they asked that we please try to get that concession for them. They will not make an issue of that point.

Mr. Waller: That is objected to among other grounds, because it is after the date of the suit, in August, August 11th, 1939.

The Court: I do not see where it is very material anyway.

Mr. Wright: If the Court please, this reports that there was a five year deal pending, and that was why these pictures were not made available to any one else.

The Court: It was an attempt referred to.

Mr. Wright: After all, the Act covers attempts as well as those attempts which actually become completed acts. I think it is very plain evidence, an attempt to tie up the Metro product for a five year period, to secure the same [fol. 1655] kind of rebate, which of course we contend is illegal, that which they knew was illegal at the time they entered into it.

The contention——

The Court: Is it the contention of the Government that a five year franchise is an absolutely illegal in itself?

Mr. Wright: It depends more on the circumstances under which it was made and the purpose for which it was made. The rest of the letter I think is merely a discussion of the terms and negotiations.

The next is a letter from Mr. Avey to Mr. Kessnich, dated November 13, 1940, Government's exhibit number 178.

> "This will confirm my understanding of——

The Court: Mr. Wright, I am just sorry, but I just can't hear you. You will have to speak a little louder.

Mr. Wright: This is to confirm my understanding of Mr. Sudekum's proposal to use our 1939-1940 releases. And there is some discussion of the picture BOOM TOWN.

"They want to make a contract for twenty-six (26) [fol. 1656] pictures, agreeing to play the top four, seven from the first ten, and seven from the second ten in the following towns:

Decatur, Ala., Gadsden, Ala., Harriman, Tenn., Gallatin, Tenn., Franklin, Tenn."

That is all for Mr. Avey.

Mr. Mitchell: Mr. Wright, do I understand this has been offered in evidence?

Mr. Wright: Yes, sir.

Mr. Mitchell: I object to it, may it please the Court, so far as Mr. Rosenbaum is concerned, it is a recitation by Mr. Avey, that he has conferred with Rosenbaum, and had an understanding with Sudekum about a contract, or course a recitation in a letter, is not evidence of the fact.

The Court: Just what is your objection to this as evidence? If he talked to him.

Mr. Mitchell: Sure if he talked to him, if he did, he can say it, but whatever else is not competent evidence, and [fol. 1657] what he talked to him about several years ago, it is objected to under the simplest rules of evidence.

However, I do not think it is so very important I just want to preserve our rights.

The Court: I am inclined to think you are right, the witness was not asked what he did talk to him about, he just wrote this letter, and they made it an exhibit to the testimony, to permit the letter to testify instead of the witness. All right. Go ahead. Sustain the objection.

Mr. Wright: I beg your pardon?

The Court: I say I sustain the objection.

Mr. Wright: If the Court please, may I see the letter a moment?

The Court: Yes, sir.

Mr. Wright: This letter says that he talked by telephone and confirmed by letter, and that Mr. Kermit Stengel was there, a defendant. I understand your Honor is sustaining [fol. 1658] the objection on the ground that that statement permitted the letter to testify.

The Court: That permits the letter to testify instead of the witness, you haven't asked the witness anything about it.

Mr. Wright: I just want to get the ground of sustaining the objection exactly. As I understand Your Honor does

not include the statement, and then there were other negotiations with Mr. Sudekum and Mr. Rosenbaum and Mr. Stengel, for a deal.

The Court: Yes, sir, you can ask the witness about if if you wish.

[fol. 1659] Q. Mr. Avey, at the time you wrote this letter of February 16, 1940, in which you said, "I talked to you yesterday by telephone regarding my negotiations with Mr. Tony Sudekum and Mr. Louis Rosenbaum, and Mr. Stengel".

Had you then been negotiating with those gentlemen with respect to a possible five-year franchise when you had the conversation?

A. Yes, I talked with Mr. Sudekum in Nashville.

Q. Just answer the question.

A. Will you state the question again.

Q. It calls for a yes or no answer.

The Court: He can answer yes or no, then make any explanation he wants to.

A. Yes, I talked to Mr. Sudekum in Nashville and I believe the letter refers to a trip I made to Florence, Alabama where I met Mr. Kermit Stengel and Mr. Louis Rosenbaum and had a further discussion regarding an extended deal, a five-year franchise.

Cross-examination.

By Mr. Mitchell:

Q. Mr. Avey, you were just interrogated by Mr. Wright regarding a letter written or that you wrote on February, 1940, in which the names of Mr. Stengel, Mr. Sudekum and Mr. Rosenbaum were called. You dod not conclude any transaction with Mr. Rosenbaum, did you?

A. No.

[fol. 1660] Q. Did you make a contract with the other parties?

A. You mean, in connection with the negotiations for a five-year deal?

Q. Yes.

A. No.

Q. Mr. Rosenbaum negotiates his own contracts, does he not?

A. Yes.

Mr. Wright: That is a conclusion of the witness. I think he can bring out the facts, just what was done by the various parties, then the Court can decide to what extent Mr. Rosenbaum negotiated his own contracts.

The Court: Ask him if Mr. Rosenbaum negotiated his.

Mr. Mitchell:

Q. Did Mr. Rosenbaum negotiate his own contracts?

A. With our Company, Mr. Rosenbaum negotiates with some sales representative of our Company.

Cross-examination.

By Mr. Waller:

Q. Mr. Avey, how long have you been Branch Manager of Loew's at Atlanta?

A. Since January, 1935.

Q. The Government has introduced in this case a number of letters between the Atlanta Branch of Loew's and Mr. [fol. 1661] Roth at Gallatin. Are you acquainted with Mr. Roth?

A. Yes.

Q. Did you have correspondence with him before you became personally acquainted with him?

A. Yes.

Q. Had Loew's had contractual dealings with Mr. Roth in Gallatin for a number of years before Crescent Amusement Company opened a theatre in Gallatin?

A. Yes.

Q. Do you recall about what time Crescent Amusement Company opened their theatre in Gallatin?

A. I think it was in the late Fall of 1937.

Q. As Branch Manager of the Atlanta Exchange, was it a part of your duties to determine whether to recommend to your superiors whether Loew's, for the ensuing season, should make a contract for its product with Mr. Roth, or with the Crescent Amusement Company?

A. Yes.

Q. Did you make a decision, so far as you were concerned, as to whether you would prefer to make the contract with Crescent Amusement Company, or with Mr. Roth?

A. After conferring with Mr. Kussnich, who was my District Manager, we recommended that we sell our 1938-1939 product to Mr. Sudekum in Gallatin, Tennessee.

Q. Did you or not obtain an application from Crescent [fol. 1662] Amusement Company for that product for Gallatin?

A. Yes.

Q. Did you submit it to New York, to your New York office along with other towns that you were dealing with, or dealing for, or dealing on, rather, with the Crescent Amusement Company?

A. What year's product are you speaking of?

Q. I am speaking of the 1937-1938 product?

A. Yes.

Q. Was the recommendation that you made with reference to Gallatin approved or rejected by the New York office?

A. Rejected.

The Court: What letter is it you want, Mr. Waller?

Mr. Waller? A letter from Mr. Postman to Mr. Kessnich and from Kessnich to Postman, introduced this morning, dated December 21, 1937, and December 22, 1937. I don't believe the letter of December 22, 1937, has been introduced.

The Court: That is the one that has been introduced right there (Indicating).

Mr. Waller:

Q. Now, according to this Government Exhibit No. 174, the letter from Mr. Postman to Mr. Kessnich—By the way, Mr. Kessnich was in the same office as you, there in Atlanta? [fol. 1663] A. Yes.

Q. It is stated that with reference to the proposed contract with Mr. Sudekum, for Gallatin, Tennessee, "I had Crescent's request and we are withholding action on the product pending receipt of further advice from you as to the reason for not continuing with our usual customer in this situation."

Was there a reply to that letter, prepared and sent by Mr. Kessnich, after collaborating with you, on December 22, 1937?

A. Yes, Mr. Kessnich wrote Mr. Postman on December 22, 1937, and furnished me with a copy of his letter.

Mr. Waller: We offer that letter as Defendant's Exhibit No. 59.

Mr. Wright: May I ask if Mr. Kessnich will be here for cross-examination?

Mr. Waller: Mr. Kessnich is ill, I understand, at the hotel. This is a part of the correspondence which has already been introduced, except the Government introduced a part of it, without the remainder which makes a connected story and we are entitled to introduce the other part.

The Court: They introduced it by stipulation. Did you ask them to stipulate on that?

Mr. Waller: I think perhaps I overlooked that, your [fol. 1664] Honor. Maybe I should have done it in advance.

Mr. Wright: We have no objection to his offering the letters, or to this exhibit.

Mr. Waller: I will read this letter to your Honor:

"Dear Mr. Postman:

In reference to the Roxy Theatre, Gallatin, Tennessee—Sudekum account, Mr. Roth operating the old theatre in Gallatin has never been a satisfactory account. Aside from that he only has a little store show, with plate glass windows in the front of it, and for a period of years we have never had anything but trouble in handling the account.

Sudekum has built a much better theatre in the situation and in allocating the prices for Gallatin, we used the rentals set up previously for another town of comparable size in the circuit. You will have to approve the Roxy Theatre, Gallatin contract as it is a part of the whole Sudekum deal and I would thank you to do so immediately. Merry Christmas. Sincerely * * *"

The Court: What is the number of that Exhibit?

Mr. Waller: That is Defendant's Exhibit No. 59.

Mr. Waller:

Q. Now, Mr. Avey, after that letter was written on De- [fol. 1665] cember 22, 1937, do you recall receiving a letter from Mr. Roth, dated December 27, 1937, and which is

filed in this case as Government Exhibit No. 30, reading from Page 540 of the record as follows:

(Counsel here read letter from Page 540 of the present Transcript of testimony, which is not repeated.)

Q. Did you receive that letter?
A. Yes.
Q. Did you send it to New York?
A. I am pretty sure that I did.
[fol. 1666] Q. Now, state then was that Sudekum contract or Sudekum application here rejected at that time? In other words, it had never been approved?
A. The application for contract——

Mr. Wright: Just a minute. If your Honor please, that is a question that has to be determined from an examination of all the correspondence.

The Court: Well, the contract shows when it was approved, doesn't it?

Mr. Waller: It was approved several months after that.

The Court: Well, what does the contract show?

Mr. Waller: The contract doesn't show. The contract is filed as Government's Exhibit No. L-5, March 30, 1938.

The Court: What is the date of that letter?

Mr. Waller: That letter was December 27, 1937.

The Court: All right. I overrule the objection.

By Mr. Waller:

Q. Now, as a result of sending the letter to New York did [fol. 1667] you go to see Mr. Roth in Gallatin? I mean did you have some conversation with New York on the telephone or otherwise?

A. I don't recall whether it was by telephone or by letter but I believe I was instructed to call on Mr. Roth along about that time.

Q. Well, did you go to see Mr. Roth in Gallatin sometime in January, 1938?

A. Yes.

Q. What took place?

A. I tried to sell Mr. Roth some pictures and he didn't buy them. I don't recall just why he didn't buy them.

Q. Do you recall whether anything was said about whether he had his playing time filled up or almost filled up?

A. I don't remember on that call. I believe I made two calls on Mr. Roth in the winter of 1938.

Q. Now, after you made your first call in January did you write him a letter after you returned to Atlanta?

A. I don't remember.

Q. To refresh your memory, I will ask you if you recall having written him on January 18th, 1938 as per Government's Exhibit No. 32, page 545 of the record:

"Dear Mr. Roth:

I wish to thank you for the courtesies extended me during my visit with you on Saturday, January 15th. I was disappointed when you told me that you couldn't use our 1937-1938 product; that you had open time for [fol. 1668] only fifteen pictures.

This will confirm, etc. * * *"

A. Yes sir, I wrote that.

Q. Well, had Mr. Roth told you he had open time for only fifteen pictures?

A. Yes sir.

Q. Do you recall receiving a reply from Mr. Roth dated January 25, 1938, Government's Exhibit—page 551 of the record but I don't see the number——

"Dear Mr. Avey:

I am unable to understand the gesture in your letter dated January 18th received this morning. I wrote you several times in September asking you to advise me by return mail whether or not you intended to sell me your product for the season of 1937-1938. I haven't received reply to it. I wasn't given a chance of refusal of the new product. Your new product was sold and is being shown by the Roxy Theatre in Gallatin and am unable to figure out how you expect them to be shown at both houses as I do not run second run pictures."

A. Now, had you offered Mr. Roth second run pictures or first run?

A. First run.

Q. Was it a fact that some of that season's product had been shown at the Crescent Amusement Company house?

[fol. 1669] A. Yes.

Q. Although the contract of the Crescent Amusement Company had never been approved?

A. The application for contract was rejected by the home office. We accepted some dates when the application for contract was made. They were post dates on just a few pictures, perhaps three or four pictures, and after the application for contract was rejected by the home office we didn't want to pull those pictures out of the Roxy Theatre on short notice so we let them go through and put through a spot-booking memo to cover the shipment of the prints.

Q. Now, did you offer Mr. Roth the remainder of your first run product for 1937-1938 other than what had already been dated by the Crescent Amusement Company?

A. You have reference to the first visit?

Q. Yes.

A. I don't remember, whether I offered him all of the 1937-1938 product except those that we had spot-booked to Mr. Sudekum or not. I do recall that he told me that he could only use a few pictures and I believe the number that he told me was fifteen.

Q. Well, after that did you see Mr. Sudekum, or let me ask you this: Prior to that time had you had any communication with Mr. Sudekum about his application?

A. Yes sir.

[fol. 1670] Q. What was that?

A. That it was rejected.

Q. Right after your visit to Mr. Roth did you again see Mr. Sudekum?

A. After my second visit to Mr. Roth at Gallatin, Tennessee, at which time I offered him a split of the product inasmuch as he could only use fifteen pictures I offered to sell him what he could use, but he had some contracts pending, I believe, with United Artists, and if the United Artists application for contract was accepted he lead me to believe he couldn't use any pictures.

Mr. Wright: If the Court please, let him state what the conversation was; not what he was lead to believe.

Mr. Waller:

Q. State, as well as you recall, what the conversation was about United Artists when you offered him a split deal? On your second visit.

A. He had a contract application pending with United Artists and if the contract was accepted he wouldn't have any playing time for our pictures; if that application for the United Artists contract was rejected he would entertain a proposition from us for some pictures.

Q. Now, was that second visit after there had been some word that he had made complaint to the Department of Justice about Loews and Paramount?

[fol. 1671] A. Yes sir.

Q. Now, did you then sometime later get a letter from him saying that he had made the United Artists contract and wouldn't need any pictures?

A. Yes sir.

Q. By the way, what were the terms that were offered——

Mr. Wright: Just a minute. Have you got that letter?

Mr. Waller: It is in the record. The Government has introduced it.

Mr. Wright: You refer to a letter that is in evidence?

Mr. Waller: A letter that is in evidence. I didn't want to go to the trouble to find it. It is already in.

Q. Did you discuss the terms of this split deal?

A. Oh yes.

Q. Did you make an offer on certain terms to Mr. Roth?

A. Yes sir.

Q. Did he make any counter-proposal?

A. Yes sir.

Q. Now, what did you do about his counter-proposal? In other words, did he specify terms in his counter-proposal?

A. Yes sir.

[fol. 1672] Q. Now, what took place about that?

A. On my return to Atlanta I had contract application prepared for a split of the product at the terms that Mr. Roth suggested and I believe that——

Mr. Wright: If the Court please, he has not answered the question. He is telling what he did in Atlanta afterwards. Let him state, first, what this conversation he had with Mr. Roth was and what the terms Mr. Roth offered were.

Mr. Waller: This is connecting up exactly with Mr. Roth's testimony about that application. I think Mr. Roth testified about it too. I am seeking his version of the same transaction.

Mr. Wright: I don't have any objection to his giving his version of that transaction but he is not attempting to do that. He is telling about what he did after he got back to Atlanta.

The Court: I guess he is leading up to it.

Mr. Waller: I think his answer is responsive to what I asked:

[fol. 1673] Q. Let me ask you again this way, Mr. Avey. Did or — not Mr. Roth tell you what he would do on a split deal, provided the United Artists deal fell through?

A. Yes sir, very definitely.

Q. When you got back to Atlanta did you make up an application in accordance with what Mr. Roth stated he would do if United Artists' application fell through?

A. Yes.

Mr. Wright: We are still objecting. I think he could tell what the deal was. What did Mr. Roth say? That is what we want to know about, not what he did when he got back to Atlanta.

Mr. Waller: All right.

Q. Was the application that you sent to Mr. Roth that the Government has already referred to in Mr. Roth's testimony—I make this statement that way without looking in the record, because I know it is in there—was the application you sent to Mr. Roth made up in accordance with what Mr. Roth stated to you he would accept if he made the deal?

A. Yes.

Mr. Wright: We make the same objection.

Mr. Waller: I submit it is competent, your Honor, without [fol. 1674] going into the terms of each. I don't imagine the witness remembers each one.

Now, here is the application in evidence as Government's Exhibit No. L-2, page 554 of the record. Mr. Roth was asked:

"Q. Now, after he went back to Atlanta did you receive from Mr. Avey application for Metro contract"

and he answered:

"A. Yes sir.

"Q. Is this the application that you received?

"A. Yes sir.

"Mr. Dobey: We offer it in evidence as Exhibit No. L-2.

"The Court: Let it be admitted."

The Court: All right. What does it say?

Mr. Waller: I don't have the exhibit.

The Court: Well, let's get it.

Mr. Wright: We concede that the exhibit he just referred to is in evidence.

[fol. 1675] The Court: Well, you are wanting to know what the proposition was, what he said he could do, and whether or not this gentleman made up an application according to what Mr. Roth told him. Now, that is the only way I can see to do that, is to read what is in the exhibit, and let him see whether that is what Mr. Roth told him he would do.

Mr. Wright: It would be interesting to test his memory in the absence of reading the application, if he was able to recall.

The Court: I don't know whether he can remember all that or not.

Mr. Waller: I think if a man makes up an application in accordance with a conversation he had two or three days before he would certainly know whether it corresponded with the conversation.

The Court: I don't know whether he would or not. He might and he might not. He might forget some of it. I can't remember what was in some of them here two or three days ago myself.

[fol. 1676] Mr. Waller: I don't think it would help him much to show him the application at this time.

Q. I will pass to you a letter dated February 21, 1938 from you to Mr. Roth, in which the following statement is made, this being Government's Exhibit L-2, a letter and a contract:

"Dear Mr. Roth:

"Following up personal call which Mr. McGuire and I made on you at Gallatin on February 9th, I enclose herewith application for Metro-Goldwyn-Mayer pictures for 1937-1938 season in exact accord with the proposal which you made to us at that time."

I will ask if that refreshes your memory as to whether you did make up the application in accord with the proposal that Mr. Roth made? (Handing paper to witness).

A. Yes. I would like to state that this was not made from memory. I am quite sure there was titles of pictures and prices made and some kind of memo so the application could be made up in the office.

* * * * * * *

[fol. 1677] Q. And did you receive from Mr. Roth a letter dated February 28, 1938, Government's Exhibit 34, in which he made this statement: "I have been really busy the past week and have not had much time to consider your offer. However, since my United Artists contracts have been approved it seems my playing time has almost been taken up." Do you recall a letter of that nature?

A. Yes, sir.

Q. Now, after that was the contract with the Crescent Amusement Company made?

A. After that?

Mr. Wright: I think the contract speaks for itself; I don't know anything to be gained by asking him whether it was before or not.

Mr. Waller: Well, I just call the Court's attention to that fact. I withdraw the question.

Q. Mr. Avey, do you remember having some correspondence with Mr. Andy Anderson at Hopkinsville about second run Metro product in the year 1938?

A. Yes.

Q. Do you recall that you sold Mr. Anderson the 1936-1937 product, second run, and that he also later wanted to buy the 1937-1938 product, second run?

[fol. 1678] A. I remember selling him some pictures, but I don't remember what season's product it was.

Q. I hand you a letter dated June 28, 1938, written by you to Mr. Anderson, or a photostat of same, and I will ask you if that refreshes your recollection?

A. Well, it would seem from this letter that I sold him the 1936-1937 product.

Q. Was he also asking for 1937-1938 product?

A. Yes.

Q. Why was it that you didn't sell him the 1937-1938 product?

A. I believe he sold his theater before he finished playing the product, 1936-1937 product, or the product sold him previous to the 1937-1938 season.

Q. Do you recall whether or not the contracts for the 1936-1937 product was to be played off starting June 1, 1938, and that during the month of June he was asking for the next year's product?

A. Well, I would have to refer to the plain terms of the contract.

Q. Well, let me ask you a question: Where you have the product sold that season and only three or four pictures of that season's product have been played, is it customary to make a contract for the next season's product?

[fol. 1679] A. No, for the next season's product we would like to have some idea of how he is fulfilling the contract before we make any other contract with him.

Re-Direct-Examination.

By Mr. Wright, For the Plaintiff:

Q. Now, Mr. Avey, before you had even sent in the application of Mr. Sudekum to play the 1937-1938 product at his new theater at Gallatin, you went right ahead and let them play the 1937-1938 pictures there, isn't that right?

A. We took some dates.

Q. I have a play-off record here for the 1937-1938 Metro product in the Roxy Theater at Gallatin, which shows you let them play two pictures in December, 1937; does that sound right?

A. That sounds about right.

Q. And then he played two more in January, is that right?

A. That sounds about right.

Q. And then he went right ahead after that and played seven more pictures of that season, in February, is that right?

A. That sounds about right.

Q. All before this contract was finally approved in May?

A. Yes.

[fol. 1680] The Court: How many pictures in all?

Mr. Wright: That is 11 pictures.

Q. Now, in this letter that Mr. Waller offered in evidence here from Mr. Kessnich to Mr. Postman, dated December

22, 1937, he says, in the last paragraph: "You will have to approve the Roxy Theatre at Gallatin contract, as it is a part of the whole Sudekum deal, and I would thank you to do so immediately." Now, can you tell us why that statement was made?

A. I can't tell you why Mr. Kessnich made a statement; you would have to ask Mr. Kessnich.

Q. Well, you received a copy of the letter?

A. Yes.

Q. And it was discussed with you at the time it was sent.

A. Perhaps so.

Q. You and Mr. Kessnich together had worked out both the deal for the Roxy Theater and the rest of the Sudekum deal, referred to as the Sudekum deal?

A. Yes.

Q. Now, in this letter that Mr. Waller introduced, dated December 22, 1937, to the home office, I believe you referred to Mr. Roth as an unsatisfactory account, is that right?

[fol. 1681] A. You have that letter?

Q. I believe the letter is from Mr. Kessnich to Mr. Postman; it is the same letter in which the statement that I have just read you, about approving the Gallatin contract. Now, do you recall just when it was that Mr. Roth became an unsatisfactory account?

A. No, I don't recall just exactly the date that he became, that we considered him an unsatisfactory account; I believe it was before I took charge of the Atlanta Branch.

Q. You wouldn't know anything about this statement here, then, and he was an unsatisfactory account?

A. I wouldn't know anything about that statement.

(Noon recess.)

[fol. 1682] Afternoon Session

R. M. Avey, resumed.

Mr. Wright:

Q. I want to show you a copy of a letter dated January 1st, 1938, from you to Mr. Connors, and ask you if that is a copy of a letter you wrote to him on that date?

A. Yes.

Q. And in this letter you state,

"As for Mr. Roth as an account. Mr. Lucy informs me——

By the way, who is Mr. Lucy?

A. Mr. Lucy was our office manager in the Atlanta branch.

"Mr. Lucy informs me that about four or five years ago he was so troublesome by writing trade magazines, condemning the merits of Metro Goldwyn Mayer pictures, that our company thought it advisable not to sell him until such time as he could show a better appreciation of our product.

"I believe your files will disclose the fact that Mr. Roth, through his lack of appreciation of our product and service, would not be classed as a satisfactory account."

A. Is that the opinion the basis for classing Mr. Roth as an unsatisfactory account?

[fol. 1683] A. He was classed as an unsatisfactory account by certain employees of the Atlanta branch, before my connection with the Atlanta branch.

Q. I don't think you have answered my question.

The Court: His answer is he can't answer because he was classed as unsatisfactory before he came with the company at Atlanta.

Mr. Wright: Came with the company at Atlanta. The reason he was so classed was the reason you stated here, was it not, because he criticised Metro-Goldwyn-Mayer pictures?

A. That was what I was told.

Q. And you continued to accept each year a very substantial payment, or very substantial payments from him for your pictures, after he had made those criticisms, is that right?

A. I presume the terms we stated were the best we could get, he having the only theater in the town.

Q. And when the customer that happened to use a Metro picture in a theater registered disapproval, you didn't take him out of the theatre or forbid him to come in the theater or exclude him from the theatre, did you.

Mr. Armistead: We object to that, Your Honor.

[fol. 1684] The Court: Well of course.

A. I was not in the theaters I do not know whether I would bar him, I am not in the running end of it, I don't know whether I would bar him from the theatre or not.

Mr. Wright:

Q. The exhibitors or customers who may criticise Metro pictures, their money is just as good as the money you get from anybody else for your purposes, isn't it?

Mr. Armistead: That is objected to, money is money everywhere.

The Court: I don't know, that is a rather broad statement. Let him answer.

Mr. Wright:

Q. Will you answer the question.

The Court: Of course he accepts anyone's money, and if they accept it it is just as good as anybody else's of course.

Mr. Wright:

Q. Now I want to offer the letter that was excluded there at first to the negotiations had with Mr. Stengel, Mr. Rosenbaum and Mr. Sudekum.

[fol. 1685] The Court: The letter is in evidence, the only objection I sustained to this, was—I didn't exclude the letter from the evidence, but its being written I excluded it as testifying to the fact that he did have a conversation with Mr. Rosenbaum, but when you asked him the question, that made it competent.

Mr. Wright: That is all.

Cross-examination.

By Mr. Waller:

Your Honor, we would like to offer in evidence as defendant's exhibit sixty, the letter of January 1, 1938, written by Mr. Avey to Mr. Connors, about which the witness was examined.

The Court: All right.

Mr. Waller:

Q. Mr. Avey, you were asked by Mr. Wright in regard to pictures at the Crescent theater at Gallatin in January and February, 1938; I believe altogether in December, January

and February, there were about eleven pictures showed, is that correct?

[fol. 1686] A. Sounds about right.

Q. Why was that done?

A. The first dates that were taken, were taken with the first application from Mr. Sudekum. That application was rejected by our home office, but we did not pull the dates because the dates were close and we did not want to deprive them of the pictures, probably they had advertised or something like that.

Q. As to the pictures that were played in February?

A. It is possible that those pictures were dated after Mr. Roth told me he couldn't use over fifteen pictures.

Mr. Wright: If the Court please, we want to object to any statement as to what was best, let him testify to what he knows.

The Court: Yes.

Mr. Waller:

Q. As a matter of fact was it in the middle of January, 1938, that Mr. Roth told you that he could only use about fifteen or twenty pictures?

A. As well as I remember it was about the middle of January.

The Court: Well can you recall of any other instance where your company allowed an exhibitor to go ahead and [fol. 1687] start playing pictures for a particular season before the contract for that season was approved by the home office?

A. Yes, sir.

Mr. Waller: Now in this letter that has been filed as exhibit number sixty for defendants, you say to Mr. Connors:

> "I believe Mr. Kessnich explained to you over the telephone that the Palace Theatre is in a store building with the plate glass still in the front. It does not have the appearance that a theatre should have and in our opinion the town has been entitled to a better theatre for a number of years. As for Mr. Roth as an account, Mr. Lucy informs me that about four or five years ago he was so troublesome by writing trade magazines, condemning the merits of Metro Goldwyn Mayer pistures, that our company thought it advisable not to sell him

until such time as he could show a better appreciation of our product."

A. Are those facts true, and was that your opinion at the time you wrote that letter?

A. Yes, sir.

[fol. 1688] Mr. Waller: Now Your Honor, the Government subpoenaed Mr. Connors of Loews, who is here in the anteroom, and I understand they are not going to put him on, he is here from New York and we would like to put him on as our witness, out of order.

The Court: I would not let you put him on out of order, unless it is agreeable to the Government.

Mr. Wright: I think that would be agreeable, to save Mr. Connors another trip down here.

Q. Did I understand you to tell the Court that it was customary for you to let an account play the pictures before a contract had been made?

A. Not customary, it does happen.

Q. It happens frequently?

A. It has been done, yes.

Q. Can you recall any instance where it was done, where the account would play the pictures?

A. Yes.

Q. And was it a new man, or any account, or an old customer in a situation?

[fols. 1689-1690] A. I can't by name, but I can refer to the records.

Q. Will you refer to your records and see if you can find such a situation for us?

A. Yes.

Further deponent saith not.

[fol. 1691] A. M. Avery, called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you tell your name and address, please?

A. A. M. Avery; residence address, please?

Q. Yes.
A. 642 Roselle, Memphis, Tennessee.
Q. And your occupation?
A. Motion picture distributor.
Q. By whom are you employed?
A. RKO Radio Pictures, Inc.
Q. In what capacity?
A. Branch Manager, at Memphis.
Q. How long have you held that position?
A. Three years.
Q. I hand you a letter from you to Mr. Jules Levy, at the Home Office, dated January 28, 1939, and ask you if you wrote that letter on that date in the course of your duties as Branch Manager?

Mr. Raftery: You offer that as to RKO? Is that offered as to conspiracy amongst ourselves?

Mr. Wright: I offer it against all the exhibitors for whateyer it may be worth.

[fol. 1692] A. That is the letter.

Mr. Waller: Is it offered on two conspiracies, RKO and independent exhibitors?

Mr. Wright: Everything that is in the case.

Q. Mr. Jules Levy, to whom this letter is addressed, what was his position at that time?
A. He was General Sales Manager at that time.
Q. Located in New York City?
A. Yes sir.

Mr. Wright: I will read it, then I will have it marked (Reading):

"DEAR MR. LEVY:

Mr. J. D. Henry, who is building a new theatre called the Roxy in Union City, Tenn. in opposition to the Sudekum Circuit, called on me yesterday for the purpose of purchasing such film as is unsold to Mr. Sudekum.

I made a deal with him only for the unsold portion of our 1937-1938 product, this consists of eighteen features, and inasmuch as it was only the program pictures that were left, he would only pay a program price, which is $10.00. He agreed to buy the remaining nine two-reel subjects at $3.50 and the sixteen

remaining one-reel subjects at $2.00, all for one or [fol. 1693] two days use. He is also agreeable to buying Snow White second run, at $25.00 against 40% of the gross, 50/50 over $150.00. He intends charging on his regular days of the week except Sunday, 10¢ and 15¢ but he will charge 10¢ and 25¢ for Snow White and run it three days to include a Sunday.

I would not sell him any of the 1938-1939 product as Mr. Sudekum's booker advised that they were putting in a second theatre themselves over there, and would no doubt use our entire 1938-1939 product."

(Letter marked Government Exhibit No. 179.)

The Court: What are the last words of that, that you read?

Mr. Wright: "No doubt use our entire 1938-1939 product."

The Court: All right.

Cross-examination.

By Mr. Waller, for Defendants:

Q. At the time you wrote this letter on January 28, 1939, did you already have a contract with the Crescent [fol. 1694] Amusement Company at Union City for the 1938-1939 product?

A. Yes sir, I did.

Q. That contract was made back in December of 1938, was it not?

A. Yes sir.

Q. So you couldn't have sold Mr. Henry any of that product, regardless of whether or not Mr. Sudekum was putting another theatre in the town?

A. No sir, I could not have.

Mr. Wright: If the Court please, the contract is in evidence, it speaks for itself.

The Court: How does the Government insist this evidence is material? It doesn't seem to me he could have sold the product there until after Mr. Sudekum signified whether he was going to exhibit the pictures.

Mr. Wright: Of course, if Mr. Sudekum had only a contract for 21 pictures, those that Mr. Sudekum played under the contract. The rest of the pictures of that season,

Mr. Sudekum was also anxious to pick up and spot book long after this conversation.

The Court: You say he did not have a contract for the entire output?

Mr. Wright: No sir, he had a contract for 21 pictures.

[fol. 1695] The Court: What was the entire output?

Mr. Wright: It is about 50.

The Court: That is what I say; it is your position he did not have a contract for the entire output?

Mr. Wright: That is right.

The Court: All right.

Mr. Waller:

Q. Did you offer those extra pictures to the Crescent Amusement Company, personally, with whom you had a contract?

A. Of the 1938-1939 season?

Q. Yes, I mean those in addition to the 21 pictures?

A. Those pictures, the way that we have always operated on contracts that are selective contracts, we always endeavor to get every account that buys a selective contract to play all the product if it is possible to do so, as a matter of salesmanship.

Q. You mean, play all the pictures, not only those they are permitted to play under the contract, but all the other pictures?

A. We try to get them to play all of our product.

Q. As a matter of fact, Crescent Amusement played all of the 21 contracted for?

[fol. 1696] A. Yes, and I think they played 18, over that, that year.

Q. That was 1939?

A. 1939.

The Court: What does the contract say about their right if they contracted for 21 pictures, can you make them play more?

A. No sir, you can't do that.

The Court: Does the contract give them the right to demand more?

A. No, I don't believe that it does, but it has always been a business practice to allow accounts to overlay their commitments if they so desire.

Mr. Wright: Is that a regular custom in the business?

A. Always has been.

Mr. Waller:

Q. In other words, the custom is to offer those pictures first to the man with whom you have a contract?

A. That is right.

Q. If he doesn't want the other——

A. If he has an account, we always offer them to him first.

Q. Have there been rejected pictures from prior season's product?

A. Yes, there were.

[fol. 1697] Q. Have you sold them to Mr. Henry?

A. We have sold them to Mr. Henry in their entirety.

Q. After he was obligated to buy them, did he play them?

A. He played three out of eighteen.

Q. And failed to play the other fifteen.

A. Yes, the other fifteen was eventually canceled and were never played off.

Redirect examination.

By Mr. Wright:

Q. Then, as to those pictures that have not been played under contract, or the others, you never made an offer of any of those to Mr. Henry?

[fol. 1698] A. No sir, I did not, I didn't know what pictures Mr. Sudekum would use and until he had selected his twenty one we had nothing available for Mr. Henry.

Q. And even after the selections were made, you offered them first to Mr. Sudekum, is that right?

A. I think we would have, as our regular account, yes.

Q. Do you know whether you did or not?

A. Off-hand presumably we did, inasmuch as he played them I would say that we did.

By the Court:

Q. Well, had Mr. Henry gone out of business when the product for that season became available?

A. I think that he went out of business early in the fall, as I recall, and the contract, Mr. Sudekum's contract had not been entirely played at that time, his play-offs.

By Mr. Wright:

Q. Well, do I understand your interpretation of the contract correctly as being that even though Mr. Sudekum bought only twenty one, there would be no pictures available for anyone else, even those he rejected, until the end of the season?

A. No, no, if he played and then gave us definite rejections of pictures in between the releases of what he had used we could then serve them to anyone else if we so desired.

Q. You don't know whether he rejected any or when he made any rejections?

[fol. 1699] A. Without checking the records back again I couldn't tell you definitely but I presume that there were some rejections, but I am sure that Mr. Henry, outside of this one time when he bought pictures, never called on me for any further business.

Q. You didn't offer him rejections?

A. No.

By the Court:

Q. You say he only played three out of eighteen of the previous season?

A. That is right, your Honor.

Further this witness saith not.

[fol. 1700] T. B. Kirk, witness on behalf of the Defendanrs, and called at this time by agreement, he having been first duly sworn, testified as follows:

Direct examination:

By Mr. Waller, for Defendants:

Q. Mr. Kirk, are you connected with Loews, Incorporated?

A. Yes, sir.

Q. At Memphis, Tennessee?

A. That is right.

Q. What is your position?

A. My present position is in the sales department, but that went into effect only day before yesterday. Prior to that time I was office manager.

Q. Prior to that time, before yesterday, you were office manager?

A. Yes.

Q. What was your connection with the accounting department, branch office, I mean?

A. At the time I was office manager?

Q. Yes.

A. Well, just, I had supervision over it, the same as in the other departments.

Q. How long have you been connected with the branch office there in Memphis?

[fol. 1701] A. Since November, 1931.

Q. In what capacity did you start, and what other changes in your duties occurred from that time until day before yesterday?

A. I started in the accounting department as assistant to the cashier; that was in 1931; and then in 1933 I was made cashier; and from there I went to a booking position, which was in 1936; I was in that position approximately thirteen months, and in July, 1937 I went to the position of office manager, which position I held until day before yesterday.

Q. Now, I show you a bunch of cards which have been filed as Collective Exhibit L-17, and I will ask you what they are?

A. Exhibitors record cards, a record to play off the contract.

Q. Now, will you explain how those records are kept, and what they show?

A. These records show the date on which each picture was exhibited and the film rental paid.

Q. That is the actual film rental paid?

A. Yes.

Q. In other words, if the exhibitor has a contract and doesn't live up to his contract, there are no entries made on those records to show that he has fulfilled his con-

[fol. 1702] tract?

A. I didn't catch that question?

Q. I say, in case there is a contract for the playing of the Pictures, and the exhibitor fails to play the pictures according to his contract, does that nevertheless show on those cards?

A. It will show as not having been played on those cards.

Q. Now, did you make the tabulation which was filed as

Defendant's Exhibit No. 58, and then, on motion of the Government, was stricken by the Court, and which I now hand you?

A. Yes, I compiled that, with the help of one of my employes.

Q. Did you compile that from those original records you referred to as exhibitors' what?

A. Exhibitor record cards.

Q. Exhibitor record cards?

A. Yes, sir, I compiled it from these cards.

Q. When did you make that compilation?

A. It was last Saturday a week ago.

Q. At whose direction?

A. At the direction of the Southern District Manager, Mr. C. E. Kessnich.

Q. I will ask you to look at the item in this tabulation [fol. 1703] which is headed, Capitol Theater, Crescent Amusement Company, 1935-1936 Product. Do you see under that the item 46 features, $1021.95?

A. Yes, I see it.

Q. Did you get that information from those exhibitor record cards?

A. I did.

Q. Were those 46 features a part of the 1935-1936 product?

A. They were.

Q. Now, were all of those played by the Crescent Amusement Company prior to September 1, 1936, or were some of them released and played after that date?

A. Some were released and played after that date.

Q. Now, as they were played were they paid for by the Crescent Amusement Company?

A. Yes.

Q. Or were they paid for in advance?

A. It could have been either; I don't remember either way.

Q. The system is, they are either paid for in advance or sent C. O. D., isn't it?

A. Yes, I will say they were played and paid for within one week of the play-date.

[fol. 1704] Q. And the amount of those 46 features was $1021.95?

A. That is correct.

Q. Now, can I have the document that was shown to Mr. Willingham. (Paper produced for Mr. Waller). I want to show you, Mr. Kirk, a tabulation which is headed, Brownsville, Tennessee, Capitol Theater, Crescent Amusement Company, and then with the heading MGM, 1935-1936 features and then a list of feature pictures with numbers by them, and certain information as to play-dates and rentals. Do you see those numbers on there? Some of the pictures starting with the number 6, and some starting with the number 5?

A. Yes, sir.

Q. What does that mean or signify?

A. It means a different year's product.

Q. Now, which year's product is numbered with numbers starting with 6?

A. Numbers starting with 6 would be the 1935-1936 product.

Q. The 1935-1936?

A. Yes, sir.

Q. And those pictures with the number 5, starting with number 5?

A. Previous to the others, 1934-1935 product.

[fol. 1705] Q. The 1934-1935 product?

A. Yes, sir.

Q. Now, the record shows Mr. Lawing had a contract for the 1934-1935 product; and I will ask you if in each case where one of those 1934-1935 pictures appears in that tabulation there is not a notation "1934-1935"?

A. There is not. The only signification would be the release on it.

Q. I am referring to another column there, those red figures under play-dates?

A. Each one with the red figure is a 1934-1935 release.

Q. And in no instance was there any item of money collected under the column "money"?

A. Correct.

Q. Now, does that tabulation include all of the 1935-1936 season's features, or only those that were released on or before July 24, 1935?

A. I believe that only includes the ones that were released prior to July 24, 1935.

Q. Now, I show you a similar tabulation which Mr. Wright has kindly handed me for the 1936-1937 season's features, MGM, which is made up in the same way as the

tabulation I have just showed you. I will ask you if in that tabulation for the 1936-1937 features, you find some pictures [fol. 1706] which have numbers beginning with the number 6?

A. Yes.

Q. Now, how many of those pictures are there listed in that year's tabulation?

A. Nine.

Q. Now, at the foot of the tabulation, or at the bottom of it, do you find the totals for the rentals on the 9 pictures of the 1935-1936 product set out separately from the table of the rentals on the 1936-1937 product?

A. They are set out separately.

Q. And what is the rental on the nine pictures from the 1935-1936 product that are listed on that tabulation?

A. $246.95?

Q. Now, will you add $246.95 to the total shown on the former tabulation of $775.00, and tell me what the result is?

The Court: $1021.95.

A. $1021.95.

Mr. Waller:

Q. Now, is that the exact amount shown on this document, this tabulation, that you made up?

A. It is.

Q. Which is marked Defendants' Exhibit 58?

[fol. 1707] A. Yes, sir.

Q. Now, Mr. Kirk, I will ask you to look on your tabulation, with reference to the 1934-1935 product, under the heading, Southland Theater, C. G. Lawing; what is shown there as to the amount of money—on the number of feature pictures, rather, and the amount of money received on those feature pictures by Loews Incorporated from Mr. Lawing for the 1934-1935 product?

A. It was 41 features for which we received $765.69.

Q. Now, was some of that money received from pictures which were not actually released prior to September 1, 1935, but which were released, played and paid for after that time?

A. That is correct.

Q. In other words, did you make up the figures with reference to the Lawing contract on exactly the same basis.

and in exactly the same way as you made up the figures for the Crescent Amusement Company contract?

A. Well, all these figures were arrived at by the same method.

Q. At that time, I mean back in 1934-1935, 1935-1936, 1936-1937, did Loews Incorporated actually release during the film season the entire product for that season, or were there carry-overs some times?

[fol. 1708] A. There were carry-overs.

Q. How did that happen? What was the reason for that?

A. Well, it could be for several reasons to account for that; in those days when we sold pictures we agreed to deliver a minimum of so many pictures or a maximum of so many pictures, approximately so many pictures, approximately one a week with certain stars; and if the stars did not happen to be available to start production at the time, it was delayed; it could be caused, perhaps, because of the star working on another picture; or it could be caused by a number of things, a number of things could cause it with which I am not familiar.

[fol. 1709] Q. You mean back in those days you might contract to sell two Greta Garbos and a Clark Gable, or something like that, and when the time came you couldn't get Greta or Clark at the right time, there might be some delay in the picture?

A. That is right.

Q. That system has been changed since that time, has it?

A. It has.

Mr. Waller: Now, may it please the Court, we will offer as defendant's exhibit 58 the tabulation.

The Court: Suppose you examine him as to each one of those set out here just on the total?

Mr. Waller:

Q. Did you find, Mr. Kirk, in addition to feature pictures you have included in your tabulations I believe short subjects and news reels?

A. Yes, sir.

Q. Take Mr. Lawing for the 1932-33 product; will you state what Mr. Lawing played and paid for out of the 1932-1933 product?

A. Played thirty-nine features, eighty-one short subjects and seventeen news reels for a total revenue of $966.77.

[fol. 1710] Q. Out of the 1933-1934 product, what did Mr. Lawing play and pay for?

A. He played forty features, ninety-six short subjects, six news reels, for which we received $1124.80.

Q. Out of the 1934-1935 product——

The Court: They got $765.69.

A. You have part of the 1933-1934.

Mr. Waller:

Q. If you have that, that $765.69 was on the features, I am also now including short subjects.

The Court All right.

Mr. Waller:

Q. What did Mr. Lawing play and pay for out of the 1934-1935 product?

A. Forty-one features, thirty-two trailers, sixty short subjects, twenty-two news reels, $1,086.69.

Q. What did the Crescent Amusement Company play and pay for out of the 1935-1936 product?

A. Forty-six features, forty-six trailers, eighty-five short subjects, 104 issues of news, a total of $1596.95.

Q. What did the Crescent Amusement Company play and pay for out of the 1936-1937 product?

[fol. 1711] A. Forty-two features, forty-two trailers, eight-four short subjects, four reissue pictures, four trailers on those reissues, a hundred and four news reels, or a total of $1,604.20.

Q. What did the Crescent Amusement Company play and pay for out of the 1937-1938 product?

A. Forty-three features, forty-three trailers, ninety-eight short subjects, a hundred and four news reels, a total amount of $1645.38.

Q. What did Crescent Amusement Company play and pay for out of the 1938-1939 product?

A. Forty-nine features, forty-nine trailers, eighty-seven short subjects, a hundred and four news reels, or a total of $1730.67.

Mr. Waller: Now, Your Honor, we re-offer the tabulation.

The Court: All right.

Mr. Waller: I have some other questions.

Q. Now with reference to the two tabulations which I showed you, listing the feature pictures, do you know who made those tabulations?

A. I believe they were made in the Memphis office.

[fol. 1712] Q. Do you know who made out these forms with the list of MGM season pictures?

A. I do not, they were sent to the Memphis office by our New York office; where they got them I don't know.

Q. In other words, what was sent to your office was a list of pictures and you were asked to fill in the play dates on those particular pictures and the results received from those pictures?

A. That is right.

Q. You had nothing to do with preparing the list of pictures?

A. No, sir.

Q. And if some 1936-1937 is listed product on the 1937-1938 form you don't know how that occurred?

A. No, sir.

Q. Mr. Kirk, did you make a search of the files at the Memphis office for the purpose of locating any applications for contracts with Mr. C. G. Lawing, made in the year 1935?

A. I did.

Q. At whose request?

A. Mr. J. F. Willingham's request.

Q. When was that search made?

A. I believe that was made more than a week ago, I can't recall the exact date.

[fol. 1713] Mr. Waller: May I have the exhibit L-18, which is that application.

(Passed to counsel by the clerk.)

Q. Did you locate in the files these three duplicates of an application made by Mr. Lawing, or purporting to be made by Mr. Lawing, dated 7/16/1935?

A. Yes, I got that out of the Memphis files.

Q. And also a carbon copy of a letter dated December 5, 1935, which is a part of this exhibit L-18, addressed by Mr. Willingham to Mr. Lawing, and stating that the applications signed for 1935-1936 product had been rejected?

A. Yes, that came out of the Memphis files, also.

Q. When these applications are made in duplicate or counterparts, are they made in different colors?

A. Four of the colors we have; white, pink, buff and green.

Q. There are only three of those counterparts you found?

A. Yes.

Q. Did you look through the files in an effort to see if there were any applications dated on any other date than July 17, 1935?

A. Yes, sir, I did.

Q. I mean July 16, 1935.

A. I did.

[fol. 1714] Q. Did you find any there?

A. No, sir, I didn't.

Q. Did you find any memorandum or locate anything to indicate that there might have been another application either before or after this one?

A. There was a letter in there from either the district office or the home office, of Loew's Incorporated, I mean that stated that it was written by Mr. Willingham, he stated that.

Mr. Wright: May it please the Court, let's have the letter.

Mr. Waller: It is already in, the letter.

Mr. Wright: We call for the letter then.

Mr. Waller: You have a letter in the file as a part of Mr. Willingham's testimony. May I see all those exhibits.

The Court: Who is the letter to?

Mr. Waller: Can you answer that?

A. I do not recall who it was to, Your Honor, it was either to the district office or home office.

* * * * * * *

[fol. 1715] Mr. Waller: I think—I am sure it makes the statement that he had taken an application and he had re-[fol. 1716] jected it and he had gone and gotten a better contract. Mr. Simons recalls that it was exhibit 165, some one says.

The Court: This is a letter from Mr. Willingham to Mr. Kessnich, thinks it would be good business to continue to do business with Mr. Lawing at Brownsville. Can you find 165 for him? Get 165.

Mr. Waller: It may be in the transcript, Your Honor. Mr. Wright says go ahead and ask the question.

Q. Mr. Kirk, do you remember such a letter as has been referred to in the colloquy?

A. Yes, sir.

Q. Did you undertake and attempt to find the application if it was still in the files?

A. I did.

Q. Were you able to do so?

A. No, sir.

Q. Did you find anything in the files, any Memorandum or letter or anything, which would suggest that there might have been an application taken after July 16, 1935?

A. No, sir, I could find nothing of that nature.

[fol. 1717] Q. Did you find any application bearing a date subsequent to July 16, 1935?

A. No, sir.

Mr. Waller: That is all.

[fol. 1718] Redirect examination.

By Mr. Wright:

Q. Do you remember when it was these play-off sheets were made up, that I am now showing you?

A. I can't remember exactly when, but I should say approximately two months ago.

Q. The list of features that is shown here on each of those sheets is the list that appears on the release schedule which the Company issues each year, which shows the features actually released during the season, isn't that correct?

A. Not during the particular contractual season, I wouldn't think.

Q. The list you have seen release schedules, showing the schedules of the pictures as released, and the conditions under which they were released, have you not, and have them year by year?

A. Yes, we get them periodically.

Q. You issue one for each season, don't you?

A. No, not a sheet like this.

Q. You have schedule releases, haven't you?

A. Schedule releases?

Q. And on the schedule releases appears the title of each picture released and the date on which it was released, doesn't it?

A. Yes.

[fol. 1719] Q. That is what you see here, in chronological order, don't you?

A. In one sense of the word, that is correct.

Q. Well, this sheet which is headed, "1938-1939 features", shows all the titles that you actually released during period of time *ocvered* by the 1938-1939 seasons, isn't that right?

A. I don't get exactly what you mean, please sir?

Q. The period from September 1, 1938 to August 31, 1939, constitutes what you call the 1938-1939 motion picture season, is that not correct?

A. That is correct.

Q. And what you see there in front of you is a list of all the feature pictures that were released during that season, is that right, and the release date of each one?

A. In the 1938-1939 season, that is correct.

Q. That is also correct with respect to each of the other sheets, is it not?

A. No sir, it is not.

Q. Now, calling your attention to the sheet here on which the 1936-1937 season features are shown, all of the features titles that are shown there were released on the date which appears under the heading "National Release Date", are they not?

A. I am Assuming they are correct.

[fol. 1720] Q. You notice these dates run from July, 1936 to August 1937?

A. Yes.

Q. That was the period covered by the 1936-1937 season, was it not?

A. No, it was not, because we had some carry-overs.

Q. I understand that you had carry-overs, which are shown there, pictures which you had sold under the 1935-1936 contract, those there shown as 1935-1936 releases, of which there are 9 in number, were all actually released during the 1936-1937 season, isn't that correct?

A. They were released during the same time that 1936-1937 releases were released.

Q. They were released on the dates shown there?

A. Right.

Q. Which was during the 1936-1937 season, isn't that right?

A. They were released at the same time as 1936-1937 releases were released, but they were a part of the 1935-1936 contracts that we had with our customers.

Q. Yes, that were contracted for in 1935-1936 features but were actually released during the subsequent season because they had not been made ready before that?

A. That is right.

Q. So that there is nothing inconsistent with this tabulation that you offer here and the figures that appear upon these sheets that I am showing you now, on which the reve-
[fol. 1721] nue received, from the pictures actually released during the season is shown, appearing at the head of the tabulation?

A. I don't know who made this sheet out, but these figures that I have compiled are the actual figures that we received for each of our year's product, regardless of when it was released.

Q. Yes, I understand that, but these are the actual figures showing what you received during the season, during the releasing season, isn't that correct?

A. No, it is not.

Q. How would you compute the actual total amount of revenue you received from features which were released by you during the particular chronological season, during a particular period of time?

A. During this season, 1936-1937 season, we released 1936-1937 productions covered by the 1936-1937 contracts, and during the same time, there were certain pictures that we had made during the 1935-1936 that were released along with, in chronological order, with the 1936-1937 releases.

Q. This total which you see at the bottom of the sheet, in the total of the 1936-1937 season is the total amount received for all of the pictures released during that season, including those that have been sold under 1935-1936 contracts?

A. Including carry-overs from 1935-1936, that is correct.

Mr. Waller: I think Counsel and the witness are using
[fol. 1722] the word "season" in two different senses; one speaking about a certain number of months, chronologically, and the other is talking about a film season.

The Court: Well, I think I understand the situation.

Mr. Wright:

Q. Now, I again ask you, there isn't anything in this tabulation which you are offering here, which in any way contradicts any of the figures that are shown on this tabulation you previously prepared on the basis of the films actually released during those seasons?

The Court: The only difference is, one set of figures was compiled on the pictures of a certain season, and the other is compiled on the pictures actually exhibited during the same season.

Mr. Wright: Actually released.

Mr. Waller: In other words, your Honor can take these two tabulations and look at that and the one Mr. Wright had, and there is no inconsistencey, but if you had just one of them, there is an inconsistency.

Mr. Wright:

Q. Now, I show you these sheets that purport to be an- [fol. 1723] swers furnished by your Company to interrogatories propounded by the Government. Those were prepared in your office insofar as Memphis territory is concerned?

A. These sheets were not prepared in the Memphis office.

Q. Those were prepared by the Home Office?

A. I don't know, sir. This is the first time I ever saw them.

Q. Wasn't the data that is shown there taken from the Memphis Exchange?

A. This? (Indicating).

Q. No, shown on here, the answer to the Interrogatory 10 purports to show the recap of the season's contracts, season by season, showing the number of features that were covered by the contract, the number actually exhibited, and the total film rental for the features covered by the contract?

A. Yes.

Mr. Waller: As I understand it, those interrogatories and answers, if your Honor please, are not a part of the record in this case, they are discovery interrogatories.

The Court: I don't know, they may want to introduce them.

Mr. Wright: We intend to introduce every one of them.

Mr. Waller: We intend to object to them.

[fol. 1724] The Court: All right, I will pass on them when they are introduced.

Mr. Wright:

Q. The figures shown in the answer to interrogatory 10, the amount received for each contract, should be the same with respect to feature pictures, as those on the tabulation that you have just identified, isn't that correct?

A. Should be the same, if everybody has done the work correctly.

Q. I notice on there, for 1934-1935 season offered by the Government, that the Memphis territory shows Brownsville, Tennessee, it shows only the Capitol Theatre and doesn't give any theatre, any pictures played or any contract for the season. On the basis of your recent search here, I take it that is incorrect?

A. We did have pictures played in Brownsville during the 1934-1935 season.

Q. And did have a contract with Mr. Lawing, that apparently they failed to catch or note in New York?

A. Correct.

Q. And the information that you have furnished in the tabulation that you have is what appeared in the 1934-1935 season, is that right?

A. That is right.

Q. With respect to feature pictures?

A. Yes.

Q. Can you also supply us with figures for 1932-1933, [fol. 1725] 1933-1934 1934-1935 seasons, which will be comparable to those I am showing you here for the ensuing seasons that were furnished by the New York Office, that is, the actual play-off during each of those three preceding seasons, you can make that up, can you not, from the records that you have there in your lap?

A. It can be made up.

Q. Can you do that for us, so that we will have complete and comparable records?

Mr. Waller: What is the question?

Mr. Wright: I am asking if he can supply us with a tabulation of the actual play-offs of the 1932-1933, 1933-1934, 1934-1935 seasons, so that we will have a record that is comparable to what we have for the ensuing season?

The Court: On the same basis as those other compilations.

Mr. Wright: That he has in his hand here.

Mr. Waller: We think those tabulations and compilations are wholly irrelevant, they don't mean anything, they are very confusing and we move that they should be stricken from the record if there are any that are already in. In other words, just as was shown yesterday when Mr. Wright handed in one, and without the two there was an inconsistency.

[fol. 1726] The Court: The witness wouldn't know, anyhow. It didn't come under the supervision of that witness. It is a proposition of six of one and a half dozen of the other. You have put in the record your compilation according to your way of looking at it, and I will permit him to put in his compilation according to his way of looking at it.

Mr. Wright:

Q. In order to make that complete, you have the same sort of records, have you not, for the 1939-1940 season, the last complete season?

A. We have in the Memphis Office, not made up in this form of record, but I can put them in this form.

Q. Can you do that for us for the 1939-1940 season, as well as sales contract recapitulation that you have already made and extend your tabulation one more year, that has already been offered in evidence here as Defendant's Exhibit?

A. Also for the years that we do not have here?

Q. Yes. That will give us a complete picture of what happened in Brownsville from the 1932-1933 season through the 1939-1940 season, both reference to the actual play-off during each year, but the amount of revenue received on each season's product.

Q. What about the carry-over? Do you want them on the [fol. 1727] release order?

Q. I assume that carry-overs will appear just as they do on these sheets. If the picture was released in the ensuing season, it will so appear, as it does there?

Mr. Wright: If the Court please, I might as well say now, that we intend to offer in the case, and that was the purpose for which this material was obtained of course, a complete record of two things: First, the information furnished in

interrogatories 10 and 12 which shows each contract that each Company made with the Crescent circuit and with its opposition during the five seasons, 1934-1935 to 1938-1939, inclusive, showing the date of the contract, the number of pictures licensed, the number played and the total amount paid for features under the contract. And in addition, we also propose to offer the answers to interrogatories 15 and 16, which show for the same seasons the titles of each each feature released during the chronological seasons, its national release date, the date it was played in the theatres which contracted for the pictures and the film rental paid therefor.

[fol. 1728] That information, of course, we feel is essential to avoid misleading comparisons such as were attempted here. I think that what happened on this situation shows the necessity of having a complete record, which shows exactly what did happen. Now, we, of course, have been somewhat handicapped by inaccuracies such as this which have turned up after the presentation of witnesses by us involving situations but in any event we will offer what the tabulation, as finally corrected shows, and exactly what did happen in each one of these situations.

Mr. Waller: I am still objecting to it not only on the ground of irrelevancy but also on the ground that it would be incumbent upon the Government to bring the people who made the tabulations, except in one instance and that is where the affairs of the Crescent Amusement Company and the defendant exhibitors are involved, and we have agreed with the Government that as to the dealings which the Crescent Amusement Company or these defendant exhibitors had with the distributors that we would accept the distributors' figures, subject to correction, of course, so far as competency is concerned—I mean so far as identifying [fol. 1729] the figure is concerned, but we still reserve the right to object to them on the ground they are irrelevant and immaterial; but so far as any dealings that any independent exhibitor may have had with any distributor, we insist that the only competent way of proving that evidence would be by bringing the man who made the figures and let us cross-examine him.

Mr. Frolich: We are going to make our objection to any interrogatories or answers to interrogatories made by the five distributors who were let out of the case on the ground

that interrogatories could only be asked for or against parties to an action, and they are no longer parties to this action.

Mr. Wright: This procedure, if the Court please, was adopted pursuant to discussions of all parties as a matter of convenience to all parties to avoid subpoenaing and production of a large mass of documents and a large number of witnesses. Now, this is the first time that it has been suggested to us that the defendant exhibitors were not willing to accept the information supplied by the distributors at its face value. Certainly I am sure they wouldn't have gone to the work of assembling it if they had assumed, after [fol. 1730] having assembled this and furnished copies to the defendant exhibitors and submitted the information to us that they would then have to come down here and bring each of the records of which tabulations were made.

Mr. Raftery: There was no agreement with the distributor defendants. Mr. Frolich's objection is still good.

Mr. Wright: As to Mr. Frolich's objection, obviously those interrogatories furnished by each company will be offered only against them and the defendant exhibitor and not against any other distributor.

Mr. Frolich: No, that wouldn't satisfy. I still urge my objection because these distributors are no longer parties and even though the interrogatories and answers are offered as against them and not against us, they still encumber the record and they do not belong here, in my opinon, because they are not parties to the action.

The Court: Well, I assume that counsel, by subpoenaing the witnesses will be able to prove what are in the interrogatories. Of course, if the purpose of making the objection is to enable you to cross-examine the witnesses, why, that is a different proposition.

[fol. 1731] Mr. Waller: In other words, your Honor, here is our position about it. Let me state first, however, there has been no agreement, express, implied or otherwise, so far as we are concerned, that the Government could use any interrogatories or answers to interrogatories as evidence except as I have heretofore stated. Now, if they want to introduce tabulations like this, we want to know the purpose for which they are introduced; otherwise, they may have a mass of records in here and we don't know the purpose of them, and then when we come to the argument of the case

Government's counsel will try to draw certain inferences and conclusions and we wouldn't know where we are.

Mr. Wright: I will tell you the purpose right now. In the first place, it is to protect ourselves against the sort of thing that is done here by selecting one situation and make up a particular tabulation from that and then make argument from that. Now, we expect to show from all the information as to the dealings between Crescent and these companies and their dealings with independents that the Crescent company was able to buy its pictures at much lower prices in comparable situations, and that this tabulation, [fol. 1732] which has been introduced here, its value would be completely destroyed as to the defendant by a complete analysis of what Crescent and Lawing did in comparable situations.

Mr. Waller: That is exactly what we thought, your Honor, and there is no such thing as comparable situations and they certainly can't be proved by statistics.

The Court: I think, Mr. Wright, that these parties who answered interrogatories, not being parties to the suit, that objection to the admission would be good.

Mr. Wright: I can only say, of the Court please, that we regard that as an essential part of our case and if they are not willing to accept, as we were, simply the figures that they submitted as taken from their records, we shall have to subpoena them with regard to the records and put them on and develop it that way.

Mr. Waller: Of course, your Honor, if they do that we are going to ask the witnesses—we don't want the Court or counsel for the Government to be mislead as to our position, that is, what one man paid for pictures and what another man paid for pictures; we want to go into a number of human elements. We may want to find out what kind of man [fol. 1733] this was.

Mr. Wright: I take it that the man who keeps the books won't know anything about what kind of fellow the man who bought the pictures was. If that is what you have in mind, I don't think there is any objection to stipulating what they say the books show is correct.

Mr. Dobey: As I understand it, Mr. Waller, you say our agreement with respect to answers filed by the distributors was an agreement to accept those answers as correct, sub-

ject to any corrections you wished to make, is limited to dealings with the Crescent Amusement Company?

Mr. Waller: It is limited to such information as the Government got from the distributors under an understanding that if they got the information from the distributors that we wouldn't supply it, and, of course, we could only supply information as to our own dealings with these distributors and we could in no way supply information to the Government as to dealings with independent exhibitors.

Mr. Wright: You don't deny that you were furnished copies of the material?

Mr. Waller. We have stacks of it in our office that we have [fols. 1734-1735] never looked at because we don't know what it is about.

Mr. Dobey: May it please the Court, I now definitely withdraw my suggestion that the trial of this case would last about ten days or two weeks and I suggest it might last two months.

The Court: Well, I took that suggestion at the time it was made in due course.

Mr. Waller: Your Honor, this exhibit that I was asking for has been located. It is Government's Exhibit No. 166 and it is a letter of July 30, 1935 addressed to Mr. Connors by Mr. Willingham, in which Mr. Willingham makes this statement: "Mr. Mock secured a deal in this situation several weks ago, which the writer rejected, went back into the town and improved the deal," • • •.

Q. Is that the letter, Mr. Kirk, you had reference to?

A. It is.

[fol. 1736] Volume XIII

Thursday, July 24, 1941

Court convened at 9:30 a. m., when the following proceedings were had:

H. G. Ballance, called on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you state your name and address, please?

A. 197 Walton Street, Atlanta, Georgia.

Q. And your occupation?

A. I am southern district manager for Twentieth Century Fox Film Corporation.

Q. Your headquarters are where?

A. I am headquartering in Atlanta.

Q. How long have you held that position?

A. I beg your pardon.

Q. How long have you held that position?

A. Since December, 1932.

Q. I will hand you a letter dated March 24th, 1934 from you to Mr. T. W. Young at the Fox Company in Memphis and ask you if you wrote that letter on that date in the course of performing your duties as southern district manager?

A. Yes sir, I wrote that letter.

[fol. 1737] Q. The gentleman to whom that was addressed was then the manager of the Memphis Fox Exchange?

A. Yes sir.

The Court: Do you want to mark that?

Mr. Wright: That should have the next Government number.

The Clerk: That will be Government's Exhibit No. 204.

Mr. Wright:

Q. I will hand you a letter dated March 13, 1936 from you to Mr. W. J. Kupper, Twentieth Century Fox Film Corporation, New York City, and ask you if you wrote that letter on that date in the course of your duties as southern district manager?

A. It looks very much like—yes, I wrote that.

Q. What was Mr. Kupper's business at that time?

A. Mr. Kupper was what we call the western division sales manager for Twentieth Century Fox headquartering in New York City.

Mr. Wright: I will ask to have that marked the next Government's exhibit number and I will offer both of these.

(Paper marked Exhibit No. 205).

The Court: Do you wish to read the exhibit at this time?

[fol. 1738] Mr. Mitchell: You say they are offered?

Mr. Wright: Yes, I am offering them and I will read them.

Mr. Mitchell: I would like to see them.

Mr. Wright: Pardon me. I thought you had seen them.

Mr. Mitchell: No, I haven't. Does this touch Muscle Shoals?

Mr. Wright: I don't think so. It will show on its face.

Mr. Mitchell: If there are any that touch Muscle Shoals I want to see them.

Mr. Wright: The letter dated March 24, 1934 from Mr. Balance to T. W. Young, Branch Manager, at Memphis, reads as follows:

"Dear Mr. Young:

"I received your letter of March 21st and I don't believe I would sell the organization trouble by making a deal with Mr. Haynes for the towns of Dyersburg [fol. 1739] and Union City.

"We are getting support from Sudekum in all of his towns, and while the deal that we received from him was not altogether to our liking, it is one of the things we have to put up with when an exhibitor like Sudekum buys product on a wholesale basis. I can well understand that it doesn't set so well to have to play a picture like George White's Scandals at $35.00, but Sudekum's business amounts to six or seven hundred dollars a week to the Atlanta Exchange, and I do not want to jeopardize it by making any kind of a deal in these towns. * * *"

There is another paragraph I didn't read.

Now, this exhibit has been marked Government's Exhibit No. 205, dated March 13, 1936, and is from Mr. Ballance to Mr. Kupper at New York.

Mr. Waller: Now, if your Honor please, that letter was dated March 24, 1934. The complaint alleged that this conspiracy started in August, 1934 and among other objections to these letters—they are the same objections which we have been making all along to the other letters of this type, and we object to this one on the ground that it is before the date of the alleged conspiracy.

The Court: All right. Read the letter and let's see what it is.

[fol. 1740] Mr. Waller: That is the one just read that I am referring to.

The Court: You mean the one he just read?

Mr. Waller: Yes sir, March 24th, 1934.

The Court: I overrule the objection.

Mr. Wright: The one I am now putting in evidence or about to read is dated March 13, 1936.

"Dear Mr. Kupper:

"As you know we have had a great deal of difficulty with the Sudekum Circuit and the procedure in the past has been such that we almost had to take anything that Sudekum wanted to give us. I have been on the verge of splitting with him a time or two, but could not see that I was gaining anything, so always late in the season would take rather unsatisfactory deals.

"However, this year, after repeated efforts to get together with him on any kind of a deal that would show an improvement over anything we received in the past, I closed up and called it a day and attempted to salvage what money I could from a few opposition points, thinking that maybe with Fox out some opposition would open up. He has opposition in the towns of Gadsden and Maryville in the Atlanta territory and in [fol. 1741] the Memphis territory, he has opposition in Paris, Tennessee. In the Indiana territory, they sell a little bit of a town outside of Madisonville, called Earlington——"

Q. Now, Mr. Ballance, there is a pencil notation on here, pointed to by an arrow, which rings the word "Earlington" and says "clause gives exhib. priv. to cancel if we sell Madisonville". Is that in your handwriting or was that put on by someone else?

A. No, that is not my writing.

Q. Do you know whose it is?

A. I don't know. I imagine it would be in the contract department of the home office. I don't really know but it is not mine, I know definitely.

Q. It wasn't put on at the time you wrote it but it was put on in the home office?

A. I don't know; I just couldn't say because it wouldn't be my writing.

(Reading continued):

"——which George Landis advised me he received a very satisfactory contract from the K-3 product. In Decatur he has opposition in a town called Hartselle, which we have sold, but this is all we could salvage:

I imagine the whole thing amounted to about seven or eight thousand dollars."

[fol. 1742] Q. That refers, does it not, to the 1935-1936 product?

A. Well, I would have to figure it out which group that we sold on, whether the fiscal year as we call is, K-3, K-4, K-5—that is the year's product. I would imagine—well, we are now selling the K— we just finished selling the K-8 so that is five years ago. It would be K-3——

Q. 1935-1936?

A. Yes, that would be.

(Continuing reading):

"Since I have sold away from Tony, he has evidenced some desire to get together with us in the future and while it is too late to sell him in some of his spots this year, we have worked out a deal that I think is excellent. I am sending you a recap of the money that we have received, which includes all of the towns in his circuit, for which he buys direct, (he still owns half interest in the Hill Circuit, but this is a separate Corporation). This shows the gross total of $24,745.50.

"Briefly, the deal is this:—he is to give us $20,000.00 for half of the K-3 product, but deducting from this, the money that he would normally allocate against the towns where we have already sold. In other words, we only sell him half of the K-3 product, but in view of the fact that we receive more from these towns than we have received from Tony, the deal will probably run up to considerably more than $20,000.00 for the K-3 [fol. 1743] product.

"The deal for these towns is to be in accordance with the proposed franchise that I am attaching. This is an accumulative 5% increase on K-4, K-5 and K-6 and will have either a weekly, monthly or quarterly payment plan, so that we received $769.00 a week for the next three years. As a matter of fact, this is a greater increase for him to pay, but he does not like the fact that I am selling what little opposition he has.

"Sudekum plays no pictures on percentage. We have never been able to get a percentage and neither does Paramount nor Metro and it is just one thing that he will not go for. As a matter of fact, he has no op-

position and is not the best operator in the world and with the big lift that we are receiving from anything we have secured in the past, I think this is an excellent deal and takes care of one of the most troublesome spots that I have almost ever experienced.

"Looking at the past records of what we have received for Fox, I believe you will agree with me that this increase from $24,745.50 to $40,000.00 with a gradual increase each year is pretty good.

"The deal has been agreed upon in principle, but he wants to allocate the money a little differently than he has in the past, but the total will start at $40,000.00 [fol. 1744] and end at $44,000.00

"I would appreciate your giving me your thoughts in the matter, or anything else you might want to add to this, but I would like to get it operating as quickly as possible. These are all very small towns, no opposition and some of them are pretty bad looking propositions insofar as gross returns are concerned, although a few of them are pretty good. I do not think I could ever do any better and I am quite sure that I could not go up there 'cold' and sell him next year's product at $40,000.00.

"I will be in Dallas for several days next week and would like to hear from you as soon as possible.

"Kindest regards.

Yours very truly, H. G. Ballance."

[fol. 1745] Cross-examination.

By Mr. Waller, for Defendants Crescent Amusement Co. etc.:

Q. Mr. Balance, in selling of pictures to a circuit, is it and have you found it an advantage to the distributor in making a deal to sell the entire circuit together from one exchange, especially where the particular exhibitor has some towns in which he has opposition and wants pictures badly in those towns?

A. Will you repeat the question, please?

Q. I have here a letter which was furnished us by the Government, purporting to be a photostat of a letter they took from your file, dated July 6, 1934, which you wrote to a Mr. Sussman in New York, regarding three towns in Kentucky—Bowling Green, Hopkinsville and Madisonville,

and you say this "He wants to buy immediately for Bowling Green, Hopkinsville and Madisonville and leave the rest of the circuit out until December; that will leave the product immediately in these situations—as these three opposition towns are the only places where we can get a little leverage." Does that refresh your memory about that situation?

A. My memory is that he needed product in those three towns a little more than he needed it in the others, and I wanted to leave what leverage I could from a sales [fol. 1746] angle, to try to get the other towns in line.

Q. In other words, you found it an advantage in a case like that to make a circuit deal, I mean, an advantage to the distributor?

A. Most assuredly.

Q. You get a better price for your product by making a circuit deal?

A. That was the ultimate goal.

Q. You were asked by the Government about a letter that you wrote to Mr. Kupper on March 13, 1936, in which you made the statement that since you had sold away from Tony he evidenced some desire to get together in the future, and that you had made a deal with him for the next year. Now, do you mean by that that when you were not able to make a deal with Mr. Sudekum that you regarded as satisfactory that you proceeded to sell away from him, and by that you forced him to make a deal next year on terms satisfactory to you?

A. Where it was possible to sell—I think it was in the K-3's—we started to sell around him.

Q. I have here another letter, which is a photostat——

A. Pardon me. I have been in an airplane three or four days and on the train—I came from California—and my ears are ringing and it is difficult for me to hear anything. [fol. 1747] Q. Mr. Balance, I have here a photostat of another letter, which the Government apparently took from the files of your corporation, dated a short while before the letter which the Government introduced; this letter which I have in my hand is dated February 14, 1936; the letter the Government introduced is dated in March, 1936—Now, in your letter of February 14, 1936, to Mr. Kupper, you make this statement, among others "Frankly, it doesn't make much difference to me whether they take K-4 or K-5

deals or not." And then again: "I don't think we will lose a quarter by not selling the Sudekum circuit and ultimately we will probably be ahead, because up in Tennessee business is pretty good at present, and there is talk of opposition in most of Sudekum's towns if we can give them product." Was it your policy to refuse to make a circuit deal, as referred to in your letter, which was unsatisfactory?

A. It was not so much our policy as it was our desire to make satisfactory deals.

Q. And through that policy you were able to make a satisfactory deal as stated in your letter in March?

A. Yes.

Q. Mr. Ballance, have you in the past made deals on behalf of Fox Film Corporation with the Crescent Amuse-
[fol. 1748] ment Company and with other defendant distributor corporations?

A. The last deal I did not make; I was in the hospital; that was the last franchise, and it was negotiated principally with Mr. Wilson, our local Branch Manager; and previous to that time I had negotiated all deals with Mr. Sudekum.

[fol. 1749] Q. Now did you also engage in or negotiate deals with the Muscle Shoals theaters?

A. Separate deals, yes, sir.

Q. And with the Haynes Circuit? Known as Strand Enterprises?

A. The Haynes circuit, with headquarters in Memphis, and Mr. Young our manager over there made deals with the Haynes Circuit, with the exception I think it was a group picture we called K-7, a group picture, we couldn't get together with Mr. Haynes so we didn't sell him at all.

Q. What about the Cumberland Amusement Company, sometimes referred to as the Hill Circuit, did you make deals with them?

A. I didn't make deals with the Cumberland Circuit, we had a partial deal one year while we were with the Sudekum Circuit and Rosenbaum Circuit—I do not know the corporate names of the circuits, we were out of the Hill Circuit for part of a year, but we were still dealing with the Sudekum and Rosenbaum, circuits.

Q. Did you make these deals as part of one deal, or were they negotiated separately?

Mr. Wright: I object to that, that is a pure conclusion, let him say what the negotiations were, and then we can decide.

[fol. 1750] The Court: Let him state the facts and tell about the deal let him state the facts about making the deal.

Mr. Waller:

Q. State how that was done?

A. The Hill circuit was always made separately.

Mr. Wright: Same objection, state what he did.

The Court: Separately from what?

A. I mean separately from the Sudekum circuit. The Rosenbaum circuit was always made separately.

Mr. Waller:

Q. You mean the deal with the Rosenbaum circuit?

A. The deal with the Rosenbaum circuit, yes, sir, other than one time, the last deal, I do not know how that last deal was made, but the Haynes circuit was always made separately, and I always for years with the Rosenbaum circuit always had separate negotiations with him, even in the years I was with Paramount, fifteen years ago, they were always made separately.

The Court: What do you mean by separately?

A. Without any reference to any deal we would make [fol. 1751] with Sudekum. Mr. Haynes operated a circuit and Mr. Ruffin a circuit; those are all in our distribution system, they operate under different heads, we held our managers responsible for those deals on those circuits, and sometimes they cleared through my office.

Mr. Waller:

Q. Has your corporation from time to times made deals for certain seasons' product with one or more of those circuits, and not with others?

A. Parts of a circuit, yes, lots of times, we had charge of the Haynes circuit part of the time, year before last, and we could not make a satisfactory deal, but we made a deal with him.

Q. Have you sometimes had a deal with some of them?

A. I think that has happened with the different units of the Crescent Amusement Company, other than the Rosen-

baum circuit, even at times when I couldn't use their other pictures, we generally always sold the Sudekum circuit, but the Rosenbaum was operated separately. I was with Paramount sixteen years, when Paramount was having some discussion with Sudekum or Rosenbaum circuit was always playing pictures to the best of my recollection, I am speaking for no other company.

The Court: When you made a deal with the Hill Circuit, agreeing upon the terms, conditions and privileges condi-
[fol. 1752] tions and so on, under the contract, did you take into consideration that that was a part of the Crescent circuit, or affiliated with the Crescent circuit?

A. Never during the time I was with them, I think we had some difficulty with Hill circuit, and we asked Mr. Sudekum to help us, and he said, let them fight their own battles, whatever they were.

Mr. Waller:

Q. With refer ce to the importance of the Sudekum circuit and the Haynes Circuit and the Rosenbaum circuit, and all these other so-called affiliated circuits to the Fox Film Corporation, I mean those with which Mr. Sudekum is directly or indirectly connected, about what per cent of the revenue of the Atlanta exchange of the Fox Film Corporation do they account for?

A. A very small portion.

Mr. Wright: I think this is wholly immaterial, Your Honor. I do not see how this is material to the issues in this case, what percentage of revenue the Fox exchange comes from Mr. Sudekum's contracts; the question we are interested in here is how much of the revenue the exchange gets from the towns in which Mr. Sudekum operates.

[fol. 1753] Mr. Waller: Your Honor, on that point, as I understand the Government does claim these defendant exhibitors exercised coertion and compulsion on the distributors to force them to discriminate against individual theaters and to force them to do things and suppress the competition of these individual theatres, I think it is relevant to show whether or not these defendants are in position to do that from the standpoint of the importance of their business.

The Court: The thing that they wanted was the business in that particular district within the Crescent circuit, where it operates.

Mr. Waller: Any individual theatre, one like Mr. Mitchell up here at Russellville; he is the only theatre operater in Russellville, he can compel these distributors to do what he wants them to do in Russellville. It is only a matter of degree, there is no other theatre in Russellville. It is many individual situations, and we can't see that it makes any difference, doesn't make any difference as we see it.

[fol. 1754] Mr. Raftery: Your Honor please, we do not think it is that at all that is an issue in the lawsuit on the Government's part, they have shown a few isolated theatres in the Sudekum chains, as the one of the shotgun type that our friend testified about yesterday, the revenue you get out of any situation depends entirely on the volume of trade, the contract you have made, we can't see that any comparative figures in any town, town against town, because the pictures never played in that particular house. It is not an issue in this suit by any means.

The Court: I do not think it is determinative at all how much of that business of the Atlanta exchange is Fox, or what proportion is Crescent business, I do not t-ink it is material in any way.

Mr. Dobey: On behalf of Mr. Buchanan, I want to bring out that his house did not start out as a shot-gun house. It became that way when Crescent competition started.

The Court: Well reserve the argument to the end of the case.

[fol. 1755] Redirect examination.

By Mr. Wright:

Q. Now, Mr. Ballance, I believe you stated you did not negotiate yourself, the Cumberland Circuit deals at all? Is that right?

A. Yes.

Q. Then you don't know to what extent the affiliation with the Cumberland Circuit with Mr. Sudekum entered into these deals, do you?

The Court: When I asked that question about Mr. Hill, I didn't mean to single out the Hill Circuit, I meant that to apply to any exhibitor.

Mr. Wright: I anted to clear that up.

A. I wouldn't know. All the negotiations negotiated from my office, I mean, as a matter of fact, that if we were not sold in the Cumberland Circuit, I would look at it and tell Mr. Wilson, our salesman, to negotiate the deal, and I know it was negotiated up in that town, what was the name of it?

Q. You are not in position, yourself, to state the extent the Crescent affiliation entered into those negotiations that Mr. Wilson had with the Cumberland?

A. Well, I think I would be, because I am there a good deal of the time. I don't know what transpired when he was talking to the different accounts, but I know when one ac- [fol. 1756] count would be sold and one would be unsold we would immediately make every effort to sell the unsold one, when we were in any territory, or that territory wherever Mr. Hill lived.

Q. With reference to your efforts to sell Mr. Hill, would you ever have to discuss the matter with Mr. Sudekum?

A. Well, I don't know—I didn't quite get that.

The Court: In the course of your efforts to sell Mr. Hill, would you ever discuss the matter with Mr. Sudekum?

A. One time, when we hadn't sold Mr. Hill, I asked Mr. Sudekum if he could intercede and help us, and he said "No, you people argue out with Mr. Hill," because we had different kinds of deals with Mr. Hill than we had with Mr. Sudekum.

Q. That is the only time you ever discussed the Hill deals with Mr. Sudekum?

A. Yes.

Q. How about Mr. Stengel, did you ever talk to him about that?

A. I have never had very many associations with Mr. Stengel, personally.

Q. Do you recall any discussion with Mr. Stengel as to the Cumberland?

A. I think one discussion we had with Mr. Hill, was several years ago—I didn't have any discussion with Mr. Stengel.

Q. In other words, if the deals went along smoothly, you [fol. 1757] didn't discuss*ed* it with Mr. Sudekum, but if there was a hitch, then you discussed it with him?

A. We have generally had a franchise with Sudekum Circuit running over a period of years, and I am under the impression that the Hill circuit has had a franchise now, but it didn't for some time.

Q. You negotiated a franchise with the Hill Circuit for the current product that is now in effect, about the same time you negotiated a franchise with Crescent, Rockwood, Muscle Shoals and the rest of them, isn't that right?

A. I don't think the Hill Circuit was negotiated at that time.

Q. You didn't take that in then?

A. No, not the Hill circuit.

Q. In connection with those negotiations for the Rosenbaum Circuit, a letter that was read in evidence there referred to a $40,000.00 deal. That was a deal that included Crescent towns and the Rosenbaum and Muscle Shoals towns, was it not?

A. Yes.

Q. When you submitted the deal, you asked to have it made up in two franchises, did you not?

A. I am under the impression that we did, yes, except I think it was several franchises.

Q. I call your attention to a letter here from you to Mr. Cooper dated March 30, 1936, and ask you if you wrote that letter? I believe Mr. Wilson wrote that letter, and a copy went to you?

[fol. 1758] A. This is Mr. Wilson's letter, yes sir.

Q. You received a copy of it?

A. Yes. There is a breakdown of the total, I mean, there is a total, it is broken down. Yes, this is Mr. Wilson's letter.

Q. The $40,000.00 was broken down between Rosenbaum and Muscle Shoals towns?

A. The different situations, yes.

Q. And the Crescent towns?

A. Yes. That is the way we make our daily sheets when they are broken down.

Q. I call your attention to another letter from Mr. Wilson to Mr. Cooper dated July 25, 1939, of which a copy was apparently made for you, and ask you if that refreshes your recollection about the dealings with the Cumberland Company?

A. Yes, I remember a letter, that copy, I remember seeing a copy of that letter.

Q. I want to call your attention to a statement in here with reference to the Hill Circuit: "All buying is done by Cowan Oldham subject, of course, to Sudekum's approval."

"They could not negotiate a deal for service until we had closed the deal for the Sudekum circuit and we want to tie this circuit up on a three year deal because in the past it has been the habit when Mr. Hill was doing the buying, to [fol. 1759] leave a company out for a year or two."

That would indicate, would it not, that at least at the date that letter was written, July 25, 1939, and subsequently, the buying of Hill's Circuit was subject to Mr. Sudekum's approval?

A. Not necessarily. I don't think Mr. Wilson intended that letter to be read that way; that is, that he wanted to have the Sudekum circuit.

Q. I am sorry, I interrupted you. Would you repeat the answer?

Mr. Waller: The reason I interrupted, I think Mr. Wright said July 25, 1935, instead of 1939.

Mr. Wright: I said 1939.

Q. Well, anyway, since the date of this letter, which appears to be July 25, 1939, do you have any different impression than Mr. Wilson expressed here as to who had the final say on the Cumberland deal?

A. In my experience, I have never known any deal that was ever made with Hill to be upset by Mr. Sudekum; that has been my experience, and I think that the thought in Mr. Wilson's letter was, as long as we were having Mr. Sudekum's circuit under franchise, he wanted to get the Hill Circuit at the same time and have them all run concurrently and have them expire at the same time.

[fol. 1760] Q. You knew that during the entire time you were negotiating, or that Mr. Wilson was negotiating with Cumberland that Mr. Sudekum was President of that Company, you were aware of that?

A. Yes. I don't know whether he was President, I don't really know.

Q. There was no doubt in your mind but what Mr. Sudekum had power if he wanted to exercise it over the Cumberland Circuit?

A. It is a mystery to me now how some of those circuits operate. They seem to run along without any supervision

or anything else, by Mr. Sudekum of anyone else. Because, many times we have been out of those circuits. I remember I came back from a trip and was looking over the unsold possibilities and the Hill Circuit was not sold and——

Q. I know you have been in and out of them quite frequently, but so far as you were concerned, you never had any doubt, in so far as Mr. Sudekum's power to approve or disapprove was concerned, you never had any doubt in your mind at all, at any time they made a deal with the Cumberland Amusement Company, is that correct?

Mr. Waller: We object to that as argument.

A. I wouldn't know that at all, because I have never seen that power exercised.

(Further this deponent saith not.)

[fol. 1761] PAUL S. WILSON, called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you state your name and address?
A. Paul S. Wilson, 20th Century Fox, Atlanta, Georgia.
Q. In what capacity are you employed by Fox?
A. As Branch Manager.
Q. How long have you held that position?
A. Since 1934.
Q. When in 1934?
A. March 30, 1934.
Q. I will hand you a letter dated August 6, 1934, from you to Mr. T. W. Young, Fox Film Corporation, Memphis, Tennessee, and ask you if you wrote that letter in the date in the performance of your duties as Branch Manager?
A. Yes, sir.
[fol. 1762] Q. Mr. Young was then branch manager at Memphis?
A. That is right.
Q. I hand you a letter dated October 10, 1934 from you to Mr. Young and ask you if you wrote that letter on that date in the course of performing your duties as branch manager?

A. That is right.

Q. And I will show you — letter dated April 30, 1936 from you to Mr. Jack Bloom of Twentieth Century Fox Film Corporation, New York and ask you if you wrote that letter on that date in the course of performing your duties as branch manager?

A. Yes sir.

Q. Who was Jack Bloom at that time?

A. He was our contract clerk in New York, head of our contract department.

Mr. Wright: The first letter, dated August 6, 1934, marked Government's Exhibit No. 206, from Mr. Wilson to Mr. Young, read as follows:

"Dear Tom:

"This will acknowledge your letter of August 4, regarding the possibility of making a deal with Sudekum for the K-2 product. It so happens that I talked with Tony Saturday afternoon over long distance, hoping to make an appointment with him for this week, but he advised me he was going out of town and would [fol. 1763] prefer to make it a little later on. I told him I would keep in touch with him and will try to get up there next week if possible.

"I do not see any reason why we should not be able to get together with him because he is very happy over the Fox product and would therefore appreciate your not doing anything with Haynes until we definitely have a 'yes' or 'no' from Tony."

The remaining two or three paragraphs I don't think I will read.

Mr. Waller: If your Honor please, in addition to our general objection, we further object to that letter because it was written before the alleged conspiracy.

The Court: About five days before?

Mr. Waller: Five days before.

The Court: Overruled.

Mr. Dobey: Your Honor, there is a Supreme Court ruling which supports your Honor's ruling on this point.

Mr. Wright: The next Government's Exhibit is No. 207, from Mr. Wilson to Mr. Young, dated October 10, 1934.

[fol. 1764] "Dear Tom:

"This will acknowledge your letter of October 8, and while I dislike very much having to ask you to bear with me on this Sudekum Circuit, when I was up there the last time there was some talk of Warners taking over the circuit and Tony, of course, would not negotiate for product until that matter was definitely settled. He said it should be definitely on or off this week and I am going to Nashville again next week.

"Naturally, I know it is not your desire to do anything in Union City with Mr. Haynes that would jeopardize six or seven hundred dollars per week for the company, so just bear with me as I am sure we will have a deal from the Crescent Amusement Company. He has not bought any new product whatsoever so you can just advise Mr. Haynes that we have a deal in the making, which we expect to close next week. I will keep you advised.

"Best wishes.

Yours very truly."

Mr. Waller: If your Honor please, I would like to call your Honor's attention to this in connection with the letters of that type. Obviously they are not relevant or material on any alleged conspiracy between Fox and the defendant exhibitors. Obviously they are being offered for the purpose of proving a conspiracy among the defend-[fol. 1765] ant exhibitors. They are undertaking to prove a conspiracy among the defendant exhibitors to which Fox was not even supposed to be a party, but letters written by representative of Fox——

Mr. Raftery: If he had sold out to Warners the consent decree would have taken care of this situation.

The Court: How is that?

Mr. Raftery: If he had sold out to Warners the consent decree would have taken care of this situation. I can't see any other materiality of that letter.

The Court: Well, I don't think the consent decree affects this lawsuit one way or the other. I have gone into that. As I see it, the only thing the consent decree did was just to suspend the prosecution of that suit in New York for a period of years.

Mr. Wright: The next letter is dated April 30th, 1936 and is Government's Exhibit No. 208. It is a letter from Mr. Balance to Mr. Jack Bloom in New York.

"DEAR JACK:

This will acknowledge your letter of April 23rd and [fol. 1766] I will ask that you please pardon my delay in answering. I have been out of the city and of course your letter was held for my return.

"I can easily imagine the difficulties you must have had in analyzing the *Sudekum* deal because I thought I would go crazy in trying to figure it out, because in starting with a lump sum of money and breaking it down into each allocation for each town probably left me a little dizzy. After that the negotiations on K-3 product were such that I twisted them around so that we received more money than we really should have.

"First of all, the total amount of revenue represented on the Sudekum K-3 deal covers a minimum commitment. It is my personal belief that we will receive more revenue from them than what the contracts represent because I feel that they will play more pictures in some of the situations than called for on the contract, however, in some of the smaller towns where they have only one theatre they may not play as many, which will necessitate certain adjustments in lieu of their playing over their commitment in other situations. Nevertheless, in the end I feel our net amount of revenue will be more than $11,256.00."

The rest of this simply recites the details of the negotiations. I propose to offer it simply to show the way the [fol. 1767] deal was made with a lump sum for all of these companies and then broken down by individual situations.

Mr. Waller: Now, is that on the Fox conspiracy or on the blanket conspiracy? That is, the one against the defendant exhibitors?

Mr. Wright: It is offered against all the defendant exhibitors.

Mr. Waller: But not against Fox?

Mr. Wright: Fox doesn't happen to be a defendant.

Mr. Waller: I mean on the Fox conspiracy.

Mr. Wright: Yes, all the defendant exhibitors in their conspiracy with Fox.

Mr. Waller: It is absolutely irrelevant on its face in regard to any conspiracy between Fox and the defendant exhibitors.

Mr. Wright: Well, I will read the next significant paragraph:

> "To start with the K-4 deal represented for the Crescent Amusement Co., the Rockwood Amusement [fol. 1768] Co. and the Muscle Shoals Theatres totaled $40,000.00. From that $40,000.00 I deducted $5,000.00 for the Muscle Shoals Theatres, $4,608.00 what we sold the K-3 product for in Gadsden to the opposition, $2,605.00 what we sold the K-3 product for to the opposition in Maryville, $1,984.00 what we sold the product for in Paris, $2,442.00 what we sold the product for in Madisonville, which is the K-4 allocation on this account, $2,432.00 what we sold the product for in Decatur, which totals $18,971.00. Deducting this from the $40,000.00 leaves $21,029.00, half of which is $10,514.50. I secured $11,256.00."

Mr. Mitchell: I didn't understand the correspondence related to Muscle Shoals Theatres but the name is called here and I object so far as Muscle Shoals is concerned; I object to the introduction of this letter.

The Court: That is just a statement of what happened.

Mr. Wright: That is the way the bill was figured, which included Muscle Shoals.

Mr. Mitchell: It is being introduced against Muscle Shoals, according to that information, and we object to [fol. 1769] the evidence as not competent against Muscle Shoals.

Mr. Waller: It shows how Fox allocated the money. I don't see how that is competent against anybody. It might be binding against Fox if they were in the case but they are not.

The Court: Well, they were named as co-conspirators.

Mr. Waller: But he is introducing this on the blanket conspiracy.

The Court: I don't understand it that way. I understood he was introducing it as evidence against the exhibitor defendants and the co-conspirator distributors.

Mr. Waller: Well, that would be Fox in this case.

The Court: It would be one of them.

Mr. Waller: Now, that is not possibly relevant on any issue of a conspiracy between Fox and the defendant exhibitors, how Fox allocated the money. I think what he is trying to show is that the defendant exhibitors made a deal together. In other words, he is trying to show that the [fol. 1770] defendant exhibitors conspired among themselves and made a joint deal.

The Court: He is trying, as I understand it, to show that the defendant exhibitors not only conspired among themselves but conspired with each individual distributor.

Mr. Waller: Well now, my point is, he can't prove under any circumstances, under any theory he can't prove that the defendant exhibitors conspired among themselves by introducing a letter written by a representative of Fox to another representative of Fox.

The Court: It was all part of the same conspiracy.

Mr. Waller: No. That is a separate conspiracy. The Government says there are nine conspiracies. They have got to prove them separately. They can't mix them up.

The Court: Well, it is a separate conspiracy insofar as the exhibitors are concerned.

Mr. Waller: Well, I know but a separate conspiracy in which the defendant exhibitors are concerned is one among themselves and no distributor is a conspirator in that conspiracy. That is the Government's own statement.

[fol. 1771] The Court: Well, there seems to be more in this case than just a conspiracy.

Mr. Wright: There certainly is, your Honor.

Mr. Mitchell: May it please the Court, may I state my attitude, the nature of my objection or the real import of my objection? It is like this. If I understand it, and I haven't completely read the letter—Paul Wilson, the witness now on the stand wrote this letter in 1936 relating to a transaction by which Fox had contracted with a number of exhibitors. A recitation by Mr. Wilson of the details of that transaction or a portion of that transaction might be relevant evidence but a letter that he wrote at that time could not any *any* way that I can see. If the original letter were here and this were not a photostat I don't see how a man employed by Fox could write a letter which would be evidence against Muscle Shoals Theatres. The witness is on the stand and he can tell the facts.

[fol. 1772] The Court: Well, the letter reflects upon the general situation. It might probably be a development of the combination.

Mr. Wright: If the Court please, certainly this letter, this memorandum of the transaction, made at the time, is better evidence than any oral statements elicited four years later as to what happened.

The Court: I am inclined to agree with you. I overrule the objection. Go ahead.

Mr. Wright: Then the statement is made with reference to the Decatur deal (reading):

> "The Decatur deal was more or less a gesture on my part to Sudekum as he called me on the 'phone while I was negotiating this deal with Mr. Rosenbaum of the Muscle Shoals Theatres and asked if I could do anything for him in Decatur. I thought it was to the best interest of the company to do so. To further substantiate Mr. Ballance's original statement, I would like to point out to you just what has happened since [fol. 1773] this franchise was negotiated. First, he has taken over the opposition house in Gadsden, Ala., the landlord having forced the opposition to vacate the property, so Gadsden is now without opposition. He has bought out the opposition in Paris, Tenn. and is negotiating to take over Maryville, so in reality it leaves as of today opposition in Maryville, this nearby town of Hartselle against Decatur and a little town outside of Madisonville, Ky. named Earlington:"

I don't think the last paragraph is material.

The Court: Well, I am admitting that, not for the purpose of establishing the facts that are stated in that last paragraph that you read but for the purpose of showing the attitude of the writer of that letter at that time and as bearing upon his mental conception of the situation.

Mr. Wright: That is correct, your Honor, and so far as those facts are concerned, we will of course establish those by independent evidence. It merely shows what the effect of those facts was upon the negotiations.

[fol. 1774] The Court: What is the number of that Exhibit?

The Clerk: No. 208.

The Court: The Clerk says he understood you to state that that was a copy of a letter to Mr. Ballance. It is a copy of a letter in response to Mr. Bloom?

Mr. Wright: Yes, sir; all of these letters that we offer by this witness, as we understand, were written by him. Then I would like to offer at this time the three year franchise that is referred to in the correspondence which covers the Crescent Amusement Company and Rockwood Amusement Company, which is dated April 2, 1936, a three-year frachise for 1936-1937, 1937-1938 and 1938-1939 seasons. I believe the Muscle Shoals franchise covering the same seasons, dated April 3, 1936, has already been offered in evidence. I will ask to have this one marked with the next F exhibit.

The Clerk: It will be F-10.

[fol. 1775] Mr. Wright: I suggest, then, your Honor, that the cross-examination proceed while we get the franchises together.

The Court: All right; you may proceed.

Cross-examination.

By Mr. Mitchell, for Muscle Shoals, etc.:

Q. Mr. Wilson, the letter that has just been discussed here by Mr. Wright, dated April 30, 1936, written by you to Mr. Jack Bloom, refers to deals of Crescent Amusement Company and Rockwood and Muscle Shoals, with a total of forty thousand dollars; the Muscle Shoals contract was negotiated, the negotiations were completed on it before you had any negotiations with the Crescent Amusement Company or Rockwood, is that true?

Q. Which franchise was that, Mr. Mitchell?

Q. April, 1936.

Mr. Wright: Excuse me just a moment: I will have the other one here in just a moment.

Mr. Mitchell:

Q. The franchise is dated April 3, 1936.

Mr. Wright: I will ask to have that marked Exhibit F-11.

[fol. 1776] (So marked by the Clerk.)

Mr. Mitchell:

Q. I am asking you whether, as a matter of personal recollection, it is not plain in your mind that your nego-

tiations with Rosenbaum for the Muscle Shoals franchise did not take place first, and whether those negotiations, as a matter of negotiations—I don't mean the signing of the contract—were not completed before you took up negotiations?

A. No, sir, they were not.

Q. Not completed?

A. No, sir.

Q. But did you not have your first negotiations with the Muscle Shoals Theaters?

A. No, sir; you see, the year before this franchise was made we did not sell the Sudekum circuit, and sold the opposition houses in the towns where there was opposition, and it had gotten to a point where it did not look like we would ever make a deal with the Sudekum circuit; but Mr. Rosenbaum came into Atlanta to arrange a deal for his town, and we persuaded him to act to see if he couldn't bring the Sudekum circuit and negotiate a deal with us for the entire situation.

Q. You asked him to help you to get Sudekum lined up?

[fol. 1777] A. Yes, sir.

Q. In the previous year, previous to this franchise, it is true, is it not, that Muscle Shoals Theaters had bought your product?

A. Yes, sir.

Q. But the Crescent hadn't bought your product?

A. That is right.

Q. And Rockwood hadn't bought your product?

A. That is right.

Q. As a matter of fact, is it not true, Mr. Wilson, that Rosenbaum continuously negotiated his own contracts with your concern?

A. You mean in the years back?

Q. Yes, and the years since; Sudekum hadn't negotiated his contracts, has he?

A. No, sir.

Q. And Rosenbaum has carried on negotiations with your company continually?

A. Yes, sir.

Q. And you have negotiated on the local proposition of sales to theaters——

Mr. Wright: I object to that.

[fol. 1778] The Court: Sustained.

Mr. Mitchell: I am cross-examining his witness.

Mr. Wright: Not on that subject.

The Court: You can make him your witness, if you want to, but you can't lead him unless you do.

Mr. Mitchell: All right; that is all I want to ask him.

Cross-examination.

By Mr. Waller, for Crescent, etc.:

Q. Mr. Wilson, you became branch manager in Atlanta in what year?

A. 1934.

Q. So when you wrote those letters in 1934 that the Government has read you were pretty green in that particular position?

A. In so far as the Atlanta territory as it existed at that time, yes, sir.

Q. When you wrote this letter of April 30, 1936 to Mr. Bloom, you had been there about two years?

A. That is right.

Q. I notice in that letter that you refer to Hartselle, [fol. 1779] Alabama and to Decatur, Alabama. How far apart are those towns?

A. Approximately eight miles, as I recall it.

Q. And what is their comparative size?

A. Hartselle is about one-tenth the size of Decatur.

Q. Now, you also refer to Earlington, Kentucky, and Madisonville, Kentucky; do you know how far apart those are?

A. No, sir, I do not; those are handled out of our Indianapolis Exchange.

Q. You don't know the size of the towns?

A. No, sir.

Q. Well, what you referred to in this letter was simply that you had an account in those two small towns, Earlington and Hartselle, and didn't have accounts in the larger towns, and that you later made sales to the people who had theaters in the larger towns?

Mr. Wright: I will object to that, your Honor; it is pure argument.

Mr. Waller: The letter has been introduced, your Honor.

The Court: Overruled.

[fol. 1780] Mr. Wright: It is plain in the letter, what he is referring to.

Mr. Waller:

Q. Is that correct? In other words, you didn't take the product away from the theater owners of these two small towns, did you?

A. No, sir.

Q. You just sold the product to the larger towns?

A. Yes, that is right; and, as I remember, we also sold the smaller towns right along.

Q. But the small towns played behind the larger towns, after you sold the larger towns?

A. That is right.

Q. Well, there is nothing unusual in that, is there?

A. No, sir.

Q. Did your company sell Parrott & Hendren in Greeneville, Tennessee, and were they a customer of the Fox Corporation at the time the Crescent Amusement Company started a theater in the town?

A. Yes, sir.

Q. What did the Fox Film Corporation do about that situation?

A. We continued to sell Parrott & Hendren as long as they operated a theater there.

[fol. 1781] Q. At the same time you were selling other Sudekum towns?

A. Yes, sir.

Q. Were you selling to Mr. Roth in Gallatin, Tennessee, after the Crescent Amusement Company started a theater in that town?

A. That is right, and we are still selling them.

Q. Although you are selling Mr. Roth, are you selling other towns that Mr. Sudekum is interested in?

A. Yes, sir.

Q. Did Mr. Sudekum ask you for a second run at Gallatin?

A. As I remember it, shortly after he opened the house he did and I refused.

Q. You refused to sell Mr. Sudekum even a second run in Gallatin?

A. Yes, sir.

Q. Although you were selling him in other towns?

A. First run in other towns, yes, sir.

Q. Now, as to Hopkinsville, Kentucky; do you remember when Andy Anderson opened a theater up there?

A. No, sir; that is out of my district.

Q. Out of your district. You are not familiar with Brownsville, Tennessee, either, I guess?

A. No, sir.

Q. Is Rogersville, Tennessee, in your district?

[fol. 1782] A. Yes, sir.

Q. Now, do you know Mr. Miller that used to have a theater up there?

A. Yes, sir.

Q. Was he a regular Fox customer or not?

A. Now, at what time?

Q. Well, back there; well, you first started, we will say, 1934; was he a Fox customer at that time?

A. No, sir, and for three or four years after that he was not a Fox customer.

[fol. 1783] Q. Well, you did make a deal, didn't you?

A. You mean before the other house was built?

Q. Well how was it, what are the facts?

A. I do not recall exactly the year, but we did not sell one year to Mr. Miller before the opposition opened in the town, and the following year we sold to the opposition.

Q. Who was the opposition?

A. The theater it was Cumberland Amusement Company.

Q. That is what is known as the Hill Circuit?

A. Yes, sir.

Q. When did you sell to Mr. Miller, or did you sell to Mr. Miller one year when the Cumberland Amusement Company had the theatre?

A. Yes, sir, I sold Cumberland Amusement Company as I recall it, only one year and then sold Mr. Miller from then on until he sold his house.

Q. So it was only one year you failed to sell Mr. Miller?

A. That is true.

Q. Now during the first year that you did sell Mr. Miller, was he a satisfied customer or what were your dealings?

A. He was rather hard to get along with.

Q. Did he complain about the pictures, and the bookings?

A. He complained about the pictures, he complained [fol. 1784] about the bookings, and everything.

The Court: Where was that?

A. Rogersville, Tennessee.

The Court: He was a mountaineer.

Mr. Waller:

Q. For the last two years before he sold out he was playing Fox product?

A. Yes, sir.

Q. Is Mt. Pleasant, Tennessee, in your territory?

A. Yes, sir.

Q. Do you remember an occasion when Mr. Page came down to Atlanta to see you about selling him?

A. Yes, sir.

Q. Had you been selling Mr. Page at Mt. Pleasant?

A. No, sir.

Q. Did he come down there and want to buy some pictures?

A. He did, yes, sir.

Q. How long had it been since he had bought any pictures from you?

A. As I recall it was from 1933, we had a little difficulty back in 1933, we had a Will Rogers picture booked on some holiday, he had sent a check and there was some question [fol. 1785] about the check and it was returned to him, in payment for the film and he said he would send another check in a short time, and asked for shipping, and that came in, I didn't want to send it, and he didn't send the check in as agreed, and we shipped that film C. O. D., and he did not take that film out of the express office.

Q. At the time he came down to Atlanta, that was several years after that?

A. I think it was a year or two before he came to Atlanta.

Q. You mean before this check transaction?

A. Yes.

Q. You do not know about it of your own personal knowledge?

A. No, sir.

Q. You were there as branch manager in Atlanta, when the question came up about getting Fox Product?

A. I was Branch Manager.

Q. Had you made a contract or deal with somebody else?

A. I had entered into a negotiation with Rockwood. I was advised that they had an option on two pieces of property and had just about closed one of those options, was just about to close one of those options on the property to build a theatre, and I made a deal with them for our product in Mt. Pleasant.

Q. At that time you did not and had not been selling Mr. Page for sometime?

[fol. 1786] A. No, sir, not since 1933.

Q. When he came down and wanted the product, what did you say?

A. I told him I couldn't make any deal, that Sudekum or Rockwood, or some one *one* were building a theatre in the town.

Q. Did you go into the situation, tell what the result was?

A. When I made the deal with Rockwood, there was a clause inserted in that contract as I recall it to the effect that if that theatre was not in operation by a given date, the contract would be cancelled.

Q. Well, I want to know did you sell the contract to Page that he wanted?

A. After that, yes, sir.

Q. Is Gadsden, Alabama, in your territory?

A. Yes, sir.

Q. Are you familair with that new picture theatre that was built over in Gadsden?

A. East Gadsden, yes, sir.

Q. What they call the Ritz theater in Alabama City?

A. Yes, sir.

Q. And there are some downtown theatres?

A. Yes, sir.

Q. Did you think about the Dixie Theatre, did you have that theatre, operated by the Crescent Amusement Company?

[fol. 1787] A. Right, I have been for many years.

Q. For many years?

A. Right.

Q. Why is it you didn't play the Alabama City theatre and the Dixie theatre day and date, why didn't you make pictures available at both theatres?

A. Crescent Amusement Company is our regular established account in that area, we have always sold Gadsden that way, always sold Alabama City, excepting one year when it was closed.

Q. Is Gadsden big enough to zone?

A. I would say no, sir, because the downtown area is more or less spread out. I never heard of zoning going into effect in towns that small.

Q. What would be the effect of attempting to play or sell pictures in the two theatres at the same time, would that be a good policy?

A. I do not know, it is a guess anyway you answer it.

Q. The Crescent had been your old, established account?

A. Yes, sir.

Q. Oldest theatres there?

A. Yes, sir.

Q. And about the Dixie?

A. Yes, sir, and besides the Dixie was the last theatre to come into the town.

[folo. 1788] Re-direct examination.

By Mr. Wright:

Q. Can you explain to the Court, Mr. Wilson, what zoning is, Gadsden being the type of town it is, what do you understanding by zoning?

A. Zoning is normally applied to larger towns, where the area is drawn around with different circles and those different circles are called Zones.

Q. That is for the purpose of a first run, or change zone?

A. That is true. The first run and the second run in that zone.

Q. And Gadsden was not big enough for doing that?

A. I wouldn't say it would be, I do not think any town of the size that is has been zoned.

A. Didn't you undertake to sell and sell for a number of years the Ritz theater in Alabama City, first run in Alabama City?

A. That is true.

Q. And in doing that you set up the Alabama City section of Gadsden as first run zone, did you not?

A. Not necessarily, as I recall it. It was only recently that Alabama City became a part of Gadsden. It was previously a separate municipality.

Q. You do not know when it did come in, do you?

A. No, sir, I don't.

[fol. 1789] Q. But in any event, you sold it the same way in or out of the city limits of Gadsden?

A. That is true.

Q. So that you want to correct your previous testimony that you did not think the city of Gadsden is big enough to zone?

A. No, sir, I still believe that.

Q. But you think you have made a mistake in selling the Ritz at Alabama City first run Alabama City, since Alabama City was incorporated into Gadsden, is that correct?

A. No, sir, because Alabama City and the Ritz theatre were always identified in all our negotiations in years gone by as a separate municipality.

Q. Yes, I understand that, but we are talking now about the municipality of Gadsden; your testimony is then that the city of Gadsden with Alabama City included, is big enough to zone?

A. No, sir.

Q. But without Alabama City it is big enough?

A. No, sir, with Alabama City and with East Gadsden and Attalla, wouldn't be big enough to zone. Your zoning usually belongs to your key towns, and give them second, third or fourth or fifth area.

Q. There is no reason in the size of the city of Gadsden which would prevent you from zoning east Gadsden, in pre-
[fol. 1790] cisely the same way you have done Alabama City, for the purpose of fixing runs?

A. I did not quite follow the question.

Q. You are familiar with the size and population of the entire city of Gadsden and its various sections, such as East Gadsden and Alabama City?

A. Yes, sir.

Q. There isn't anything in the size, geographically or population, or set up, of those areas which would prevent you from making the same kind of a zoning arrangement with respect to East Gadsden that you have made with respect to Alabama City, is that right?

Mr. Raftery: Your Honor please, we are just encumbering the record. On the Government's case the witness fully testified that they are not interested in playing pictures day on day with Alabama City, he said he wanted to play after, or before.

. . . . . .

[fol. 1791] The Court: Objection to all this testimony about zoning Gadsden is sustained.

Mr. Wright: That is including the testimony brought on by Mr. Waller's examination on direct.

[fol. 1792] The Court: Yes, sir.

Mr. Wright:

Q. When was this conversation you say you had with Mr. Page from Mt. Pleasant?

A. It was in 1938 I believe.

Q. When in 1938.

A. Now I will have to refer to the records to give you that.

Q. You do not know what part of the year it was?

A. No, sir.

Q. When was it you made this deal with the Rockwood Company to let them have your product in Mt. Pleasant?

A. It was some time prior to the time I talked with Mr. Page, but just what the date is I don't know.

Q. It was for a theatre that Rockwood was thinking about erecting?

A. Yes, sir.

Q. When they did not build the theatre of course you couldn't make the deal, that is right?

A. Correct.

Q. And when you found that out, you offered the pictures to Mr. Page.

A. Mr. Page wanted them.

Q. I say, but you did not offer them to him until after [fol. 1793] the Rockwood decided not to build the theatre?

A. I offered them to him for four years previous to that.

Q. I am talking about with reference to the time he wanted them?

A. That is right.

Q. Have you got a copy of the agreement you made with the Rockwood Company?

A. I believe it is in the file now I do not know I am sure it was in the files I sent to the home office, I do not know.

Q. Will you see if you can get it for us?

A. I will be very glad to.

Q. Do you recall, I believe you testified you had sold Mr. Miller in Rogersville and when Cumberland came in and opened up an opposition house, you sold the Cumberland the next season?

A. That is right.

Q. And then you sold the account to Mr. Miller?

A. That is right.

Q. And the reason you sold back was because you were unable to make a deal with Cumberland Amusement Company.

[fol. 1794] A. That is right.

Q. You did not offer the pictures to Mr. Miller until after you found you had not been able to sell them to Cumberland?

A. That is Cumberland for the whole circuit, that is right.

[fol. 1795] Q. I believe you said you sold, you served Roth with pictures at Gallatin, even after Sudekum came into Gallatin, is that right?

A. Yes.

Q. The reason you kept on serving him was because he had a deal in existence at that time, isn't that right?

A. No sir, we continued to sell Mr. Roth every year.

Q. I know, but the time Sudekum came into Gallatin, you then had a contract with Mr. Roth under which he was entitled to your pictures, first run, at Gallatin; that is a fact?

A. I imagine so, because we have sold him every year.

Q. He had a three-year deal that expired with the 1938-1939 season?

Mr. Raftery: We object to that unless Mr. Wright calls it a franchise, not a deal.

Mr. Wright: I will be glad to call it a franchise.

A. We did have a franchise; now, exactly when it expired, I don't recall.

The Court: Did you re-sell him after the franchise expired?

A. Yes sir.

Mr. Wright:

Q. That was for the 1939-1940 season?

A. Yes. Also for the 1940-1941 season.

[fol 1796] Q. At the time the franchise expired was about the time this suit was filed?

A. I don't remember. I know one time I made a deal, with Mr. Sudekum, it was brought to his attention by Mr. Stengel that Gallatin was not included in that deal and Mr. Sudekum's remarks were "That is all right, Paul has a regular account there and that has been their established policy."

Q. When was it Mr. Sudekum asked you for a second run at Gallatin?

A. As I recall it, it was about two or three months after he opened the theatre at Gallatin.

Q. Do you know how big Gallatin is?

A. As I recall it, it is around 3200.

Q. Do you sell second runs anywhere in towns of that size?

A. Not to my knowledge.

Q. Parrott & Hendren, at Greenville, Tennessee, that was one of the places that you sold independents while you were or just before you made the three-year franchise with Mr. Sudekum, isn't it?

A. I don't recall the date, but we sold them every year that they were there.

Q. Well, they weren't there for the season that you made, the first season of the three-year franchise, that is right, isn't it?

[fol. 1797] A. Without checking the dates of the two contracts, I couldn't say.

Q. You made the franchise in April, 1936?

A. When did Parrott & Hendren sell out?

Q. June, 1936, I believe.

A. Well, we had a deal—

Q. That deal you had was for the 1935-1936 season, which was made prior to the deal that you made for the franchise with Mr. Sudekum; that is right?

A. That is right.

The Court: We will have a short recess.

(Recess).

Mr. Wright: I am through with the witness.

Cross-examination.

By Mr. Waller:

Q. Mr. Wilson, you were asked about the size of Gallatin, you were merely giving your best guess of the size, I take it?

A. That is right.

Q. It might be considerably larger than the figures you mentioned?

A. That is right, or it might be smaller.

(Further this deponent saith not.)

[fol. 1798] the Twentieth Century Fox Film Corporation.

Mr. Waller: Your Honor can see by looking at them, one was not sent and the other one was copied from the first one with the exception that was stricken out that part that was stricken out, had to do with a little theatre.

Mr. Wright: Whatever they show, they show.

The Court: Well, Mr. Henry has already testified about them.

Mr. Waller: I would like to recall Mr. Wilson for one question on cross-examination.

PAUL S. WILSON, recalled for further cross-examination, testified as follows.

By Mr. Waller:

Q. Mr. Wilson, I hand you a photostat of a letter dated October 18, 1937, or rather a photostat that appears to be an original copy of such a letter, addressed to Mr. J. L. Davis, Clinton, Tennessee; this being one of the photostats made by the Government from the Fox files, I will show you that and ask you if you recall that, and if you wrote any such letter? (Passed to the witness.)

A. Yes, sir.

[fol. 1799] Mr. Waller: We offer that as defendant's exhibit, whatever it is.

The Clerk: Defendants exhibit No. 70.

Mr. Waller: This letter reads as follows:

"October 18, 1937. Mr. J. L. Davis, Clinton, Tenn. Dear Mr. Davis: This will acknowledge your post card of October 16 advising that the Rogersville Theatre is operated by Mr. Cowan Oldham and yourself and that you are interested in our product for Rogersville, Tenn.

"I regret exceedingly that it was not possible for Mr. Laseter to work out a satisfactory deal with Mr. Hill and Mr. Oldham while he was in Tennessee last week, and the only deal that we are interested in making, insofar as Rogersville is concerned, is one in conjunction with the other towns operated by the Cumberland Amusement Company, or Mr. Oldham and Mr. Hill."

Yours very truly.

Q. Mr. Wilson, is it a fact that you refused to sell product for the Cumberland Amusement Company theatre in Rogersville, Tennessee, because you had not been able to make [fol. 1800] a deal with them for their theatres in their other towns?

A. That is right.

The Court: That was one of the levers was it?

A. Yes, sir.

Mr. Waller:

Q. So you sold that product to Mr. Miller instead of the Cumberland Amusement Company?

A. Yes, sir.

Q. Did you have any figures, do you have any figures as to the comparative revenue Fox Film Corporation received from Mr. Miller in 1934-35 season and from the Cumberland Amusement Company in 1935-36 season?

Mr. Wright: If the Court please, before we go any further with this kind of examination, we have the same situation up we had with respect to Brownsville. We have asked for and received what is presumably a correct figure for the contracts made with Cumberland and with Mr. Miller for the Rogersville, Tennessee, situation, covering the whole five year period 1934-5, 1939-40 contract, and offered this in evidence. We have also applied for certain information as to the other theatres and those at Rogersville, covering the same period, and we intend to offer those.

[fol. 1801] Mr. Waller: I will withdraw the question, Your Honor please.

The Court: All right.

Further deponent saith not.

Mr. Wright: I think that finishes up with the exception of the current Fox franchises. Will you get those. We have already offered in evidence these.

The Court: Franchises for 1938-39 season?

Mr. Wright: Yes, and in addition to those we offer the existing franchises that were made with Crescent and Lyric which covers the 1939-40 and 1940-42 seasons, and we would like to offer the companion franchises made with Fox and the Rockwood Amusement Company, Cherokee Amusement Company, Dixon theatre, Russell Amusement Company, Hartsell Theaters corporation, Lord Theaters, Inc., New-

port Amusement Company, Inc., Kentucky Amusement Company, which is dated August 22, 1940, and contains so-called deal sheets, which are attached, which was signed by the parties and dated June 27, 1939, and I ask that be [fol. 1802] given the next exhibit number.

The Clerk: No. F. 12.

Mr. Waller: We would like to know the purpose for which it is offered, and perhaps make an objection if it is a limited offer, or if it is a general offer, we would like to know what is the purpose and intent for which it is offered.

Mr. Wright: It is a general offer.

Mr. Waller: We object.

The Court: It is against Fox distributors.

Mr. Raftery: I thought he might be creeping up on us.

Mr. Waller: I think we are entitled to know in a situation of this kind, the purpose for which the document is offered, we might want to introduce some evidence in regard to it if we knew the purpose of it.

The Court: He said he is making a general offer, as part [fol. 1803] of the conspiracy and combine.

Mr. Waller: We object to it as irrelevant.

The Court: Overruled.

* * * * * * *

[fol. 1804] agent of Cherokee Amusements, Inc., he represents and manages the Cherokee interests, and perhaps he is also interested if the very fact he testified as president of the Newport Amusements, rather than holding title in the Cherokee.

The Court: You can ask him on that matter, first.

J. W. Baird, being first duly sworn, testified as follows.

Direct examination.

By Mr. Wright:

Q. Will you state your address?

A. I am a little hard of hearing.

Q. Would you state your address, please, Mr. Baird?

A. Newport, Tennessee.

Q. And your occupation?

A. Manager of the Newport, I manage the Winston Park theatre at Newport.

Q. And you are president of the Newport Amusements, Inc., a corporation?

A. That is right.

Q. And you own half of the stock of the corporation?

A. That is right.

[fol. 1805] Q. And the remainder, or the other half of the stock is owned by Cherokee Amusements, Inc.?

A. Yes, sir.

Mr. Wright: If the Court please, I think that brings out the ownership there.

The Court: Are you employed in any manner by the Cherokee Amusements Company?

A. I didn't understand.

The Court: Are you employed in any way by the Cherokee Amusements Company?

A. No, sir.

The Court: Are you an officer of that corporation?

A. No, sir.

The Court: Any connection with them at all in an official capacity?

A. No, sir, not with Cherokee.

Mr. Wright: We think that brings him within the rule.

[fol. 1806] The Court: I don't think it does.

Mr. Wright: Certainly he is president and the general manager of the Newport Amusements, and is the agent for the stockholders of the company.

The Court: He is not an agent for the stockholders he is an agent for the company.

Mr. Wright: Where the only stockholder outside of himself is Cherokee Amusement Company.

The Court: I can't help it, it is still a corporation just as much a legal entity as an individual.

Mr. Wright: I won't press the point further except to say that it is perfectly obvious that his position in the lawsuit it seems to me is precisely as an adverse party, and is wholly as adverse as it would be if he were employed directly by Cherokee, instead of acting as manager of properties in which Cherokee only had the half interest.

The Court. That is a different proposition, I don't know.

[fol. 1807] whether he is an unwilling or hostile witness or not.

Mr. Waller. Your Honor please, no relief can be had against him in this case.

The Court. I am just ruling that he is not an adverse party under Rule 43 (b), for an agent or manager or officer or director of an adverse party.

[fol. 1808] Q. Mr. Baird, the Newport Amusement Company was incorporated on April 8, 1937, was it not? I hand you a certified copy of the charter. Now, the charter shows, Mr. Baird, that at the time that corporation was incorporated only one thousand dollars worth of stock was issued, although $10,000.00 was authorized; that one thousand was issued to you?.

A. How much was issued?

Q. I say, the original one thousand dollars worth of stock that was issued, was issued to you, was it?

A. The original stock was; it was incorporated at $10,000.00.

Q. Yes, but according to the charter that you have in front of you there, the entire $10,000.00 was not issued at the beginning, only $1,000.00 worth of stock was issued?

Mr. Waller: Under the corporation laws of Tennessee, it is required that there be one thousand dollars of stock; the capital, the actual capital can, of course, be much greater than that.

Mr. Wright: Q. What I am trying to get at is, to whom was this stock issued, who paid for it?

A. It was issued at the same time.

Q. The entire $10,000.00 of stock was issued?

A. Yes.

Q. To whom was that issued?

[fol. 1809] A. I can't hear you?

Q. To whom was that $10,000.00 worth of stock issued?

A. There was $4500.00 of it issued to myself. $500.00 to my wife, and $3500.00 to the Cherokee Amusement Company.

Q. How about the remaining $500.00?

A. $500.00 to Mr. Stengel, Mr. Parrott, and Mr. Hendren.

Q. $500.00 each to Stengel, Parrott, and Hendren?

A. Yes sir.

Q. What was the consideration that was given for the other stock that was issued to the various parties?

A. You mean, what did they pay me for the stock?

The Court: What did they pay for it to the corporation?

A. They paid $5,000.00 for half of it.

Mr. Wright: Q. What did they, Hendren, Parrott and Stengel and Cherokee Amusement Company, all together pay? Did they pay $5,000.00 for their $5,000.00 worth of stock?

A. Yes sir.

Q. How was that paid?

A. By check, for $5,000.00.

Q. Isn't it a fact that before any stock was issued to them, that you had transferred to the Corporation the equipment in your Winston Theatre at Newport, in return for the $10,000.00 worth of capital stock that was authorized and issued?

[fol. 1810] A. That is right.

Q. And then after the $10,000.00 in stock was issued to you in return for the equipment and the theatre, you sold one-half of the stock to the Messrs. Parrott, Hendren, and Stengel and Cherokee Amusement Company?

A. I sold them a half interest for $5,000.00. That was for the equipment in the Winston Theatre at Newport.

Q. Well, it was for——

The Court: Did that $5,000.00 go to you or to the corporation?

A. It went to me.

The Court: That is what you are trying to develop isn't it, Mr. Wright?

Mr. Wright: I don't think it went quite that way. As I understand the transaction, Mr. Baird transferred his equipment in the theatre to the corporation and received $10,000.00 of stock, then he transferred one-half of the stock to Parrott, Hendren, Stengel and the Cherokee Amusement Company, in return for $5,000.00.

The Court: Which went to him, under your theory?

Mr. Wright: Yes.

The Court: That is what he said.

Mr. Wright: Perhaps I misunderstood him.

[fol. 1811] Q. What led up to the formation of the corporation, how did you happen to form this corporation and issue this stock to these people?

A. Well, Mr. Parrott asked me if I would like to sell a half interest in the theatre. I had bought a theatre off of Mr. Parrott before that in Newport, and later I bought this theatre off Mr. Parrott and Mr. Ausmus, back in July, or

along about the first, I believe it was, of July, 1938. No, wait a minute, that isn't right. In 1929, I bought this off of Mr. Parrott; later he came and he asked me if I would sell him a half interest in the Company. I told him I didn't know, hardly, I would think about it and let him know.

Q. Now, this Winston Theatre, then, you had been operating there in Newport since 1929, is that right?

A. I started at Newport along in 1928.

Q. The Winston Theatre, when was that built?

A. I started off on November 20, 1935.

Q. That was when you opened the new theatre, then?

A. Yes sir.

Q. Had there been any competing theatre operated in Newport?

A. Yes sir.

Q. During that time?

A. Yes sir, back in—I opened up the Gay Theatre on [fol. 1812] June 16, 1928, and the following December 21st, Ed Booth opened a house on Church Street, called the Ritz Theatre and he operated there until he went broke.

Q. When was that?

A. What?

Q. When was that?

A. That was June or July, 1929.

Q. Then there were not any opposition theatres operated there from 1929 up until 1937, is that right, for the period from 1929 to the time that you organized this corporation, there had been no opposition in the town?

A. No, there wasn't any opposition in the town.

Q. Now, before the corporation was organized, you had been advised, had you not, that someone had bought a lot or two lots that were to be used for theatre purposes in the town?

A. Yes, there had been a lot bought.

Q. Do you know who had bought that lot?

A. Well, it was my understanding that it was the Crescent Amusement Company.

Q. Now, with whom did you make the arrangements for the incorporation of this Company and the transfer of the stock?

A. Mr. Parrott and Mr. Hendren.

Q. Did you discuss it with Mr. Stengel, too?

A. No sir, I did not. I had met him, but that was all.

[fol. 1813] Q. Mr. Parrott and Mr. Hendren were both, then officials of the Cherokee Amusement Company, Inc.?

A. Yes.

Q. And on the incorporation of the Newport Amusements, Inc., Parrott and Hendren and Stengel all became officials of the Newport Amusement, Inc. did they, and continue to act as officials?

A. I didn't understand you?

Q. Those gentlemen are still acting as officials of the Newport Amusements?

A. That is right.

Q. And they each receive a salary from Newport Amusements?

A. Yes sir.

[fol. 1814] Q. What services does Mr. Stengel render for the salaries that he receives?

A. Well, advice and—we advise together as to how to advertise pictures.

Q. He also does film buying for Newport, does he not?

A. He does some of it, yes sir.

Q. Newport doesn't pay the film companies direct for its films, does it?

A. I didn't understand.

Q. The payments that are made by the Newport Amusement Company for films are not made direct to the film companies, are they?

A. Yes sir, they are.

Q. Don't you make payments to the Crescent Amusement Company?

A. I make about ninety five to ninety nine per cent direct.

Q. On some deals, however, you do not?

A. Once in a while maybe on something like a boxing picture or something like that I maybe pay it to the Crescent.

The Court:

Q. What kind of picture?

A. A boxing picture like a Joe Louis fighting picture, something like that.

[fol. 1815] Cross-examination.

By Mr. Waller:

Q. Mr. Baird, what is the population of Newport?

A. The present population?

Q. Yes.

A. About thirty five hundred.

Q. Now, you own the Winston Theatre and lease it to the corporation, do you not?

A. How do you mean?

Q. You own the property?

A. Yes sir, I own the property.

Q. Now, does Mr. Stengel do the bookkeeping for the Newport Amusement Company?

A. I can't hear you.

Q. Does Mr. Stengel do the bookkeeping for the corporation?

A. He has it done, I suppose; I don't know.

Q. Don't they keep the books over here at Nashville?

A. Some of them they keep here.

Q. You say he does the film buying?

A. Part of it.

Q. Well, he gets your approval on all deals, does he?

A. Yes sir.

Q. You were asked whether or not the Newport Amusement Company paid the Crescent Amusement Company rather than making payments direct to film companies. Is it true that with United Artists that is done?

[fol. 1816] A. What is that?

Q. On United Artists pictures do you pay direct to United Artists or do you pay it to Crescent Amusement Company?

A. To Crescent.

Q. That is the only company that is done that way, isn't it?

A. I believe it is unless there is one picture they probably buy, RKO, one, and as I said awhile ago, a fighting picture, back, it has been two or three years ago.

Q. You were asked about this man that competed with you in 1929 and went broke. What was his name?

A. Ed Booth.

Q. Do you know anything about the circumstances under which he went broke? What caused it?

A. What circumstance do you have reference to?

Q. I mean what was it that caused him to go broke?

A. Well, it would be hard for me to say what was the cause of his going broke.

Q. Well, you didn't have anything to do with it, did you?

A. Well, I was his opposition in Newport; I don't know.

Re-direct examination.

By Mr. Wright:

Q. Just one more question. What was the amount of your investment in the Winston Theatre there?

A. Well, I don't know the exact amount. It was somewhere around $10,000.00.

[fol. 1817] Q. That is the equipment you are talking about?

A. That is right, just the equipment alone.

Q. How about the theatre building itself?

A. Well, I haven't—let's see. It would run around $25,000.00, somewhere in that neighborhood.

Further this witness saith not.

Mr. Wright: I want to offer this copy of the charter of the Newport Amusement Company as Government's Exhibit No. 230.

(Charter filed as such exhibit.)

[fol. 1818] W. F. Ruffin, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you state your name and address?

A. W. F. Ruffin, Covington, Tennessee.

Q. And your occupation?

A. Theatre operator.

Q. You are employed by a corporation?

A. Yes sir.

Q. What is the name of it?

A. The Ruffin Amusement Company and the Chickasaw Amusement Company.

Q. Two companies?

A. Yes sir.

Q. What is your interest in the Ruffin Amusement Company?

A. My wife and myself own half the stock.

Q. Who owns the other half?

A. Mr. Stengel and Mr. Sudekum.

Q. What is your interest in the Chickasaw Amusement Company?

A. My wife and myself own one half and Mr. Stengel owns the other half.

Q. You are the president of the Ruffin Amusement Company?

A. Yes.

Q. What office do you hold in the Chickasaw Amusement Company?

[fol. 1819] A. President.

Mr. Wright: May it please the Court, I think this witness is also adverse within the language of Rule 43 (b) and I would like permission to examine him——

The Court: I think he is probably an unwilling or hostile witness and may be interrogated by legal questions but the rule doesn't say an "adverse witness". It says "adverse party" and he is not a party to the suit and his company is not a party to the suit. You may question or interrogate him as an unwilling or hostile witness by leading questions but you can't contradict or impeach him as an adverse party.

[fol. 1820] Mr. Wright:

Q. When did you first enter the theatre business, Mr. Ruffin?

A. I opened my first house in May, in Covington, Tennessee.

Q. Where, Covington, Tennessee?

A. Covington, Tennessee.

Q. And what theatres were you operating just before the Ruffin Amusement Company was organized?

A. I was operating Covington, Newbern and Martin.

Q. All in Tennessee.

A. All in Tennessee.

Q. You had one theatre in each town?

A. Yes, sir.

Q. I will show you a certified copy of the charter of the Ruffin Amusement Company, Inc., from which it appears that it was incorporated January 11, 1937?

A. That is right, yes, sir.

Q. What circumstances led up to the incorporation of the Ruffin Amusement Company?

A. As an individual I installed and operated and owned the Ruffin Amusement Company.

Q. You had been using that as a trade-name in the operation of your theatres?

A. That is right, and it was an individual business, and [fol. 1821] on January 11th, as you state here, as the Ruffin Amusement Company, we incorporated.

Q. And you issued in par value $40,000.00 capital stock?

A. That is right.

Q. Half of that was issued to you and your wife?

A. 199 shares were issued to me, one share to my wife; one share to Mr. Sudekum and 199 shares to Mr. Stengel.

Q. Each share of the par value of one hundred dollars?

A. Yes, sir.

Q. When was it the Chickasaw Amusements, Inc., was incorporated, do you recall?

A. I believe in 1935. I didn't incorporate it myself.

Q. When was it you acquired your interest in it?

A. In May, 1937.

Q. And what was the consideration given by you for your half interest in Chickasaw?

A. Eleven thousand dollars.

Q. That was for how much stock?

A. That was for five shares.

Q. For five shares?

A. Five shares.

Q. And the total capital of the corporation was ten shares?

A. Was ten thousand dollars.

[fol. 1822] Q. Ten shares of one hundred dollars, par value, each?

A. That is right.

Q. And you paid eleven thousand dollars for the five shares you received?

A. Five thousand dollars.

Q. Where was Chickasaw Amusements, Inc., operating theatres then?

A. In Milan and Humboldt, Tennessee.

Q. Milan and Humboldt, Covington, Newbern and Martin are all fairly close together, are they not?

A. Well, Milan and Humboldt are 12 miles apart; although Milan is 70 miles from Covington, Humboldt is 58

and Newbern is 59 miles from Covington, and Martin is 75 miles from Covington.

Q. Where are Newbern and Covington with reference to Humboldt?

A. Newbern, I would say is about 45 miles from Milan, and Martin is about 31 miles from Milan.

Q. How about Humboldt?

A. Humboldt is 12 miles from Milan; that would be 43 miles from Martin.

Q. Now, Mr. Stengel is also an official of Ruffin Amusements?

A. Yes, sir.

[fol. 1823] Q. And has been since its incorporation?

A. That is right; he is Vice-President of the Ruffin Amusement Company.

Q. He receives a salary for those services?

A. Yes, sir.

Q. And what services does he render?

A. In an advisory capacity, in visiting the towns, and at present doing the buying of films.

Q. Well, hasn't he been buying the bulk of the films since he became an official of the company?

A. Starting with the Fall of 1937.

Q. Beginning with the Fall of 1937?

A. Fall of 1937.

Q. And in making payment for your films, you sometimes make it direct to, or make checks payable to the Crescent Amusement Company, instead of direct to the film company.

A. That is only on one contract.

Q. That is the United Artists contract?

A. That is right.

Q. Now, I will hand you a series of typewritten tabulations that you produced in response to the subpoena that was issued, and ask you what those are?

A. These are copies taken from the cut-offs in the film exchanges and from our files, showing what we paid for [fol. 1824] film rental to each company covered in the years that the subpoena asks for.

Q. If you will refer to them, they are the terms of the contracts?

A. The terms of the contracts, and in clauses that were in the contracts?

Q. Yes, sir, and they don't show the actual amount of rental paid under the contract, do they?

A. No; just so many pictures at a stipulated price.

Mr. Wright: I will just ask to have those marked successively as exhibits.

The Court: Do you want the charter admitted, too?

Mr. Wright: Yes.

(Exhibit marked Government Exhibit No. 231.)

Q. Those exhibits that you are just referring to, those tabulations covered each of the towns where you have operated theatres both before and after they were taken over?

A. No, it only covers the towns which the subpoena asks for.

Q. Those towns are Covington, Newbern, Martin, Greenfield?

[fol. 1825] A. And Greenfield.

Q. And Hickman, Kentucky?

A. And Hickman, Kentucky.

Mr. Waller: Your Honor, as the Ruffin Amusement Company is not a defendant in this case, we object to this testimony, and we would like to inquire the purpose of it.

Mr. Wright: The purpose of the testimony is to show that there was a very substantial improvement in the terms on which these theaters were able to buy their films after they became affiliated with Mr. Stengel and Mr. Sudekum.

The Court: Did you understand that, Mr. Waller?

Mr. Waller: Yes, sir; we object on the ground that although the tabulation might show difference in terms, there might be different reasons for it.

The Court: I overrule the objection at this time, you can cross-examine him on that.

Mr. Raftery: For the United Artists, we object, because [fol. 1826] the contracts put in evidence show that the United Artists did not sell any pictures on any specific terms to this particular exhibitor; we sold him pictures where we got our money in advance, on a flat deal, so much for a particular picture for either of the three situations; and any break-down that this man may make between himself and Crescent is not binding on us.

The Court: Well, I think you are right in that.

Mr. Wright:

Q. These tabulations you have just been referring to are for the Major companies?

A. The eight companies.

Q. The eight major companies?

A. Yes, sir, the eight major companies.

The Court: Are there eight major companies?

Mr. Raftery: I don't think they have, even in that, because Mr. Connors put in one company in a super-major state.

Mr. Frolich: I object to this document the witness has produced: it is not competent evidence; the Columbia contracts are the best evidence. Any amendments would have [fol. 1827] to be shown by the contract and not by any statements made by this witness.

The Court: Now, what does the tabulation attempt to show?—Let me see it. (Examining paper.) Well, of course, if your contract that was signed should show contradictory terms or prices, why, I take it the contracts are the best evidence.

Mr. Wright: There is no question about that, your Honor, if they are offering to contradict those tabulations, they should offer the contracts.

Mr. Frolich: I haven't the contracts with me but I could get them in a half hour.

The Court: Well, you can get them this afternoon, better have the witness here this afternoon.

Mr. Frolich: Yes, sir, all right.

[fol. 1828] The Court: If there is any discrepancy, you can't tell it until you have your exchange contract.

A. You see in 1930-36, we had a fire, and we followed the subpoena as close as we could, it was necessary to take a lot of these records from the film exchange from their old records and that is the reason it is tabulated as it is.

Mr. Wright:

Q. I show you this contract that seems to be dated September 9, 1938, and ask you if that was signed by you and Mr. John D. Henry on or about the date it bears there?

A. Yes, sir.

Mr. Wright: I will ask to have that marked as Government's next exhibit, and offer it in evidence.

This contains an agreement made with Mr. Henry referred to on the stand, Mr. Henry referred to it on the stand but was unable to produce.

Q. I hand you a letter, copy of what purports to be a copy of a letter from you to Mr. Stengel, dated December 15, 1938, and ask you if that is a copy of the letter you wrote on that date?

A. Yes, sir.

Q. I also hand you a letter, copy of a letter from you [fols. 1829-1833] to Mr. Stengel, dated December 18th and ask you if that is a copy of a letter you wrote on that date?

A. Yes, sir.

Q. And another copy of a letter from you to Mr. Stengel dated December 19, 1938, did you write that letter on the date it bears?

A. Yes, sir.

Q. And I show you copy of a letter from Mr. Stengel to you dated December 21, 1938, and ask you if that is the reply you received from Mr. Stengel?

A. Yes, sir.

Q. I will ask to have those four letters marked with Government's next exhibit numbers and offer them in evidence.

Q. I show you a letter, what purports to be a copy of a letter from you to Mr. Stengel, dated January 7, 1939, and ask you if that is a copy of a letter you wrote on that date to Mr. Stengel?

A. Yes, sir.

Q. And I show you copy of a letter from Mr. Stengel to you dated May 9, 1939, and ask you if you received that letter from him on or about that date?

A. Yes, sir.

Q. I will ask to have those two marked as the next Government's exhibit numbers, and offer them in evidence.

. . . . . .

[fols. 1834-1840] Q. As I understand, Mr. Ruffin, these tabulations are limited to the pictures that were actually bought for the town and the seasons they were bought, during the period from 1934-5 to 1939-40, inclusive, is that correct?

A. Yes, sir. And I might state this; we did not open the theatre in Greenfield until 1937.

Q. Obviously in some of these situations with respect to some of the pictures no comparison will be possible?

A. That is right.

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[fol. 1841] (Recess.)

Mr. Wright:

Q. When did you acquire the Palace Theatre at Newbern, Mr. Ruffin?

A. Started operating the theatre on July 4, 1927.

Q. And you have operated it continuously?

A. Ever since.

Q. Ever since?

A. Yes.

Q. That was one of the theatres that went into the Ruffin Amusement Company when it was organized?

A. Yes sir.

Q. When did you acquire the Ruffin or Palace Theatre at Covington, Tennessee?

A. The Palace Theatre was the theatre which we took over in June, 1927, and was destroyed by fire on January 29, 1936, and the Palace Theatre was rebuilt and named the Ruffin Theatre.

Q. That was just—There was only one theatre operated at that time?

[fol. 1842] A. We operated in a temporary location while we were reconstructing the Ruffin.

Q. You continued to operate that theatre down to the present day.

A. Yes.

Q. That was the——

A. That was called the Palace.

Q. When did you acquire the Capitol Theatre at Martin?

A. In September of 1931, September, 1931.

Q. You have continued to operate that down to the present time?

A. Yes sir.

Q. And the Capitol at Martin, the Ruffin at Covington and Palace at Newbern were, then, the three theatres which formed the capital of the Ruffin Amusement Company at the time it was organized?

A. That is right, yes sir.

Q. And during the time those theatres have been operated, they have been the only theatres operated in the town, is that correct?

A. That is right.

Q. Both before and after the organization of the Ruffin Amusement Company?

A. Yes.

Q. Now, I hand you this tabulation that you made with [fol. 1843] respect to the Palace Theatre at Newbern, which has been marked Government Exhibit No. 236; and ask you if the 1936-1937 contract, as summarized there, for that theatre, was negotiated prior to the time the Ruffin Amusements, Inc. took over the theatre?

A. Which company do you have reference to?

Q. This is RKO?

A. As well as I remember, the 1936-1937 contracts were made before the incorporation of the Ruffin Amusements, Inc.

Q. The 1937-1938 contract, which appears first, was made after you incorporated?

A. That is right.

Q. Will you please just read the feature terms—You can leave out the rest—for the two contracts?

A. This is RKO. Which year do you want? All of them?

Q. Just 1936-1937, and then 1937-1938.

A. 1936-1937 features at 35 per cent; 7 at $30.00; 30 at $11.50. 48 pictures offered, 40 contracted for.

Q. All I want to get is a comparison of the features and terms?

A. 1937-1938. Instead of, and I might state here, that those three features and 7 features against percentage and no guarantee. In 1937-1938, it was a flat rental deal: 3 at $22.50; 5 at $15.00; 11 at ——; and 6 at $12.50.

The Court: As I understand before you incorporated [fol. 1844] you played your films at a fixed rental against a percentage, and after you incorporated you didn't have any percentage contract?

A. We still played some pictures on percentage but we preferred to play them flat.

Mr. Wright: I didn't get the last of your answer?

The Court: He said he still played some pictures on percentage but preferred to play them on a flat basis.

A. On a flat rental.

Mr. Wright:

Q. Now, will you turn to the next sheet there. Which company is that?

A. Universal.

Q. Was that the Universal 1936-1937 contract, do you recall whether that was made before or after the incorporation?

A. It was made before.

Q. You think it was made before?

A. Yes sir.

Q. Will you compare 1936-1937 and 1937-1938, Universal?

A. Six pictures at $15.00. 6 at $13.50; 18 at $11.50 and 6 at $10.00.

Q. Will you read 1937-1938?

A. There were 4 at $15.00; 8 at $12.50; and 10 at $10.00.

[fol. 1845] Q. Will you turn to the next Company?

A. Columbia.

Mr. Frolich: That has been stricken out.

Mr. Wright:

Q. Will you read the 1936-1937 contract and make the same comparison between 1936-1937 and 1937-1938 deals?

Mr. Frolich: Just a moment. I understood your Honor ruled that out.

The Court: I understood there was no 1936-1937 Columbia.

Mr. Wright: That was in other towns and in order to clear that up, I eliminated these towns that were acquired subsequently.

The Court: Do you have a 1936-1937 contract with Columbia on some towns?

A. Yes sir.

Mr. Frolich: Which town are you reading from?

A. Newbern.

Mr. Frolich: I didn't know.

A. Six pictures at $25.00; 6 at $20.00; 5 at $15.00 and the balance at $12.50. 1937-1938: 4 at $15.00; 6 at $12.50; Balance at $10.00.

The Court: How is this going to be helpful to the Court? I don't know how to analyze this proof. There are so [fol. 1846] many distinctions entering into those prices and different numbers of pictures and different prices. How

can you fix anything definite about it, is what concerns me?

Mr. Wright: For one thing, you can see, without any question, the elimination of percentage deals. Now, in addition to that, in the Columbia, you line up with about the same number of pictures, the total, but you get a different allocation; that is, the 1937-1938 shows a lower top, and a rental lower number of pictures allocated to the top rental bracket.

The Court: It looks to me like we are going to have an accounting if we keep on with that kind of proof. I just can't—Suppose you read those figures over again?

A. Six at $25.00——

The Court: What year is that?

A. 1936-1937. 6 at $25.00; 6 at $20.00; 5 at $15.00; that is 1936-1937.

The Court: Now read 1937-1938.

A. Four at $15.00; 6 at $12.50; the balance at $10.00.

The Court: How much is the balance?

Mr. Frolich: Is the number of pictures for the balance indicated?

[fol. 1847] Mr. Frolich: The first is 6-6-4?

A. The first is 6-4-6.

Mr. Frolich: Whose pictures? But there is no difference, the balance may be 40 or 50 pictures, you can't compare them.

Mr. Raftery: The great mass of evidence is that those exhibitors sign a contract, then don't play them off at the price sold. I am talking about the independents; there may have been adjustments, there may have been eliminations, the pictures may not have been made. They talk about the percentage feature: We haven't got the play-off on the percentage.

Mr. Wright: I think we have in the answers, they should be in the answers to the Columbia interrogatories.

[fol. 1848] Mr. Raftery: Well, then, read your interrogatories if they give the actual facts and not have the Court guessing at it. You remember Mr. Willingham stated this, the contract value—and Mr. Wright admitted it meant nothing, and I agree with him in the position here that contract value doesn't mean anything.

By the Court:

Q. Well, in 1937-1937 pictures you say you had six at $25.00?

A. Yes sir.

Q. And then another six at $25.00?

A. No, another six at $20.00 and five at $15.00 and the balance at $12.50.

Mr. Raftery: It might have been that year because they had some great pictures, Mr. Frolich to the contrary, but nevertheless there is only one figure that will mean anything—they paid seventy per cent for Gone with The Wind that grossed——

Mr. Wright: That hasn't anything to do with it.

Mr. Raftery: That is the only figure that he has that means anything because everybody knows about Gone With the Wind, because it is a great picture and did great business but when you come along with a lot of figures here and [fol. 1849] offer the contract value and stipulate the playoff and everything else, it is just getting us nowhere fast.

The Court: At the same time there did seem to be a considerable difference in the contract price for pictures in 1936-1937 and 1937-1938. Now, I don't know just what accounts for that difference. The defendants may say it is a difference in the quality of the pictures, etc. and I understand it is the Government's theory it is a difference in cost on account of becoming affiliated with the Crescent and they can get lower prices.

Mr. Raftery: You can make up schedules in this case to prove anything but if you stick to the facts the facts will come out very clean.

Mr. Wright: But what we are trying to prove in this case is something that everybody in the film business and all counsel in this courtroom know, that when you get in on circuit buying you are able to get very substantial benefits from that method of doing business in the form of lower film rentals. Now, if they are willing to stipulate that fact we can dispense with all of this detailed proof.

[fol. 1850] Mr. Raftery: We certainly are not. We will stipulate that Mr. Sudekum, once he makes a contract, he will abide by it and that is as far as we will go.

Mr. Frolich: Because in making these contracts with the independents is never like this. Our hopes were completely frustrated and they played half the pictures or one third of

the pictures and walked off with the contracts and cancelled them and when Mr. Sudekum signed—and this will come out in letters that are going to be read—when he signed a contract it was lived up to, as one of the Government's witnesses said, one hundred cents on the dollar. That may account for the prices we gave him. There may be a lot of factors here that way.

The Court: Well, it may be but that is a question that will have to be developed.

Mr. Raftery: We don't think it is that. We think we have the right to sell anybody at any price we see fit. It is a matter of bargaining. We haven't a commodity that you can place a value on. We say we can go into a town or sell or not sell as we see fit. We say we can go in and sell exclusively. You heard Mr. Connors on the stand the other [fol. 1851] day say he shows his pictures first run in Nashville and he doesn't sell a single second run to Mr. Sudekum in the town. If you want to see Metro pictures in Nashville you have to go to Loews or you don't see them. Now, that is his election, the way he wants to sell. We still say each distributor could separately handle it and it is not a question of a circuit. We say that we have a right to sell for less or for more or for nothing. If we want our pictures shown for nothing we have the right to do so but that is not the issue here. Mr. Wright is trying to show comparative figures that don't mean anything as far as this litigation is concerned. We have the right to sell cheaper to Mr. Ruffin if we want to sell cheaper. The evidence indicates, however, from the witness, that the distributor tries to get all he can get and the exhibitor tries to buy them for as little as he sees fit. As Mr. Morgan put it, Mr. Sudekum is a cold-blooded buyer and buys as cheap as he knows how. Now, comparative figures are not going to help the inquiry in any respect. When you come down to it, it is the play-off. They have got the answers and if the answers are competent, and I doubt that they are as to what Mr. Sudekum paid for films or any exhibitor paid for films in this inquiry——

[fol. 1852] Mr. Waller: If your Honor please, in addition to what Mr. Raftery has stated, of course, if an exhibitor pays a certain price for films one season, especially if he has them on percentage or on a guarantee against percentage, I should say, and it develops that the prices were out of line with what he realized on the pictures, of course,

when the salesman comes around next year he will say "Look here, what you did to me last year; you have got to give me a reduction this time". It is a trading proposition. The pictures one year may be good and the next year they may be louzy and they always trade each year on that basis. You may make a poor trade one year and a good trade the next year. Those things happen all the time in the business world.

Now, Mr. Ruffin has been asked to give comparisons and he hasn't yet given Loews and I happen to have the figures here, which are exactly opposite. He paid more when Mr. Stengel made the deal than when Mr. Ruffin made the deal.

Mr. Frolich: I think because Loews might have had a better product for that year.

Mr. Waller: And on Fox still I think in 1937-1938 there was a slight difference. In other words, paid a little less, a little less variation, and in the 1938-1939 Fox got a whole [fol. 1853] lot better deal out of Stengel than they had ever gotten out of Ruffin. Now, they are different.

Mr. Wright: Mr. Waller evidently wants to argue the figures but he doesn't want to have them go in the evidence.

Mr. Waller: I want to say, they are not relevant; you can't make a comparison that means anything, just as Mr. Raftery said.

Now, furthermore, this Columbia deal was in the settlement of a lawsuit, entered into in the settlement of a lawsuit.

The Court: What lawsuit? The Columbia deal?

Mr. Waller: The one that has been read to your Hohor, those comparisons. There are all kinds of extraneous elements that enter into those things and it is just impossible to take figures of one year and another year and show that it proves anything.

Another thing, it frequently depends on the time of the year when you make a deal. For example, suppose an exhibitor had played up most of his playing time and a film [fol. 1854] salesman comes along and the exhibitor says: "I only have room for twenty pictures" and this film salesman knows that two or three competitors will be in there working on the man next year and will do a lot better trading than if he knows the exhibitor doesn't have all of his playing time filled up. In other words, the trading position of the two parties in the different seasons has a lot of bearing upon it.

The Court: Well, I think that it is an important part of the Government's case if they can show that the Sudekum circuit was able to secure rebates or lower prices from the distributors than their competitors were able to secure and that theatres which became affiliated with the Sudekum circuit were able to secure concessions and lower prices on their films than they were able to secure before they became affiliated. Whether or not these exhibits show it, is a different proposition.

Mr. Waller: Your Honor, I suggest this, after this examination on this particular exhibit, that I be permitted to cross examine the witness and then let your Honor——

Mr. Raftery: I don't want to withdraw the objection but I would like to point out to your Honor. Once you sell a picture to an exhibitor you have removed any comparison [fol. 1855] in the town because each picture is a separate proposition and each year's product is a separate proposition and the next year's product is entirely different pictures from the ones of this year. And that is known to everyone at this table. Where a particular company—we will take Metro, and they say they make the finest pictures——

The Court: Yes, and I sustained your objection to that.

Mr. Raftery: Where they had fourteen of the year's big fine pictures, and we must admit that they have the finest stars and the finest people in the business, and then they will come along and have—as Judge Cordoza, in the case of Broadway Photoplay vs. World Films for the exhibition of certain pictures in a specific theatre on upper Broadway in New York, said—as the Court put it, the contract was no sooner made by the distributor than it was broken. It didn't furnish that group of pictures for exhibition in that theatre. They came in and sued for damages and they sought to show over comparative periods the revenue of the theatre with pictures which they said were of equal merit and Judge Cordoza said, "No, you can't do it. There is no way for [fol. 1856] anyone to speculate as to what a particular group of pictures would do." You are dealing with human taste and fancy; you are dealing with a product that there is no way of estimating the value of or what it means or what it is worth, and they allowed a six cents recovery in a case against Mr. Wright that Mr. Driscoll tried, and he got a six cents verdict on a similar state of facts. You have no way of dealing with comparisons of a picture. When you

sell a particular picture that particular deal on that picture may be good and it may not.

[fol. 1857] The Court: Well that is true.

Mr. Raftery: That is the thing we are dealing with here; we are not dealing with parchment paper or anything that the Government is fooling around with in their various anti-trust cases. We are dealing with a different problem. I say any one of the Government counsel can get up a schedule or set of figures to prove any contention they want to make.

The Court: You believe in the theory that you can prove anything by an account?

Mr. Raftery: Yes, sir, pretty nearly; but you can't prove what a picture might have done in these little towns.

The Court: He is not attempting to prove what they might have done in Tennessee.

Mr. Raftery: Well, to prove their sales value.

Mr. Wright: If the Court please, the proposition is so obvious that 100 theaters buying together can get better [fol. 1858] terms for any particular theater in the group than that theater can ever get for itself, I agree it does seem like an awful waste of time and effort to offer detailed evidence to prove a fact that everybody in the industry knows.

Now, if the gentlemen take the position that the fact is an intangible one and is not susceptible of accurate proof and merely a part of the circumstances of the situation, we will probably want to make an argument on that basis.

Mr. Raftery: I have said this to you, Mr. Wright, and I have said it to you and your associates, too, that in building a theater in every situation, you could set up that idea of competition that he talks about, where you have a competitive market, where you can come in and sell your product either to this man or that man; you might be able to create a competitive situation. They have not shown in any one of the situations that they have a situation like that, with the exception of Andy Anderson of Hopkinsville, who remodeled an old theater. Now, as said in one of those exhibits yesterday; analyze the situation and if you can get the United Artists as much money out of the terms by sell- [fol. 1859] ing Sudekum's opposition, go to it; but if you can't, level off and see if we can get the best deal out of Sudekum that is possible.

The Court: That is what the Government is complaining about.

Mr. Raftery: I will answer that; What of it? I will answer it that way.

Mr. Frolich: I take it the contracts would be the best evidence; I don't have the contracts, but I have some records, and they are authentic; I will stand by my records. Now in 1936-1937 in Newbern we had made a contract with the Ruffin Amusement Company for 52 pictures, of which they played off 42. In 1938 we didn't make a contract. They spot booked pictures. And they spot booked pictures the following season. And the last contract I haven't got. Mr. Wright thinks it very funny. I can't see the humor of it. They ought to prove it with proper evidence. The figures are available.

Mr. Wright: If the Court please, the only thing that seemed humorous about it to me was counsel getting up and [fol. 1860] in the form of argument offering his testimony as against a witness on the stand under oath.

Mr. Frolich: I have contracts at my hotel; I can produce them this afternoon.

The Court: All right; I will defer my ruling on the matter until you can bring the contract this afternoon. I think the contract is the best evidence. Now, he says his contracts for 1937-1938 don't show what the witness' compilation shows.

Mr. Waller: If your Honor please, I am not undertaking to testify but if I can make a statement that would be regarded as enlightening, I would be glad to do so; in regard to that Columbia deal, what I was informed was that a man who had a theater at Alamo, sold out without complying with his contract, and the Ruffin Amusement Company bought his theater and he and the Ruffin Amusement Company made a deal with Columbia on a spot booking arrangement, whereby, in order to satisfy the obligations of the man at Alamo, they would play certain rentals. It was totally different from an ordinary contract.

[fol. 1861] The Court: Of course, you would be permitted to show that in explanation of these figures.

Mr. Waller: I am not speaking about this particular compilation, but just to show your Honor that in any comparison that might be brought up, there would be so many extraneous matters that it would be impossible to go into all those matters in the trial of this lawsuit.

The Court: Well, I don't know; we have gone into everything else.

Mr. Wright:

Q. Mr. Ruffin, would you turn to the next company and make a similar comparison between the 1936-1937 features?

A. Just one second: I just noticed, while you all were arguing here, that there is no set price for any year that we buy a film. Now, 1939-1940 Columbia's deal was increased, and in 1940-1941, Columbia's deal was increased, you see.

Q. Increased in——

A. In dollars and cents.

Q. Well, normally your film rentals increased every year in accordance with the increase in your business, isn't that true?

[fol. 1862] A. No, in other words, the policy in selling pictures, as Mr. Raftery there mentioned, is that the distributor tries to get all he can for them from the exhibitor, and the exhibitor tries to get them as cheap as he can.

Q. You had a much larger gross at your theater in 1939-1940 than in 1936-1937?

A. No; frankly, we were not grossing as much money.

Q. What is the next year?

A. 1936-1937, 32 at $12.50, score $3.00; 14 at 15 dollars; score $3.00; 12 at $13.00, score $3.00; 10 at $10.50, score $3.00. In 1937-1938, 4 features at $7.00; and the contract was bought flat rental instead of percentage; and 8 at $35.00, which was $10.00 increase over the 12 for $25.00. 8 at $12.50; 12 at $15.00; the balance at $13.00.

Q. Now, will you turn to the next company?

The Court: What year was that?

A. That was for 1937-8.

Mr. Wright: 1937-1938.

Q. The next is United Artists; will you read that?

A. 11 at $20.00; 4 at $17.50; 4 at $15.00; 4 at $12.50 and 2 at $10.00.

Q. What season are you giving?

[fol. 1863] A. 1936-1937? For 1938-1939, 12 at $15.00——

Mr. Raftery: What about 1937-1938?

A. I didn't make a deal; I couldn't get together with the St. Louis office.

Mr. Raftery: Now, 1938-1939, we are going to object to that; it is an allocation made by this witness in which we had no part.

The Court: All right; I will see what the allocation is.

Mr. Wright:

Q. Now, for 1938-1939?

A. Now, 1938-1939, 12 at $15.00.

Q. What is the next company you have there?

The Court: Is that all of that?

A. 1939-1940 and of course 1940-1941.

The Court: I mean you just played 12 pictures in 1938-1939?

A. That is right.

The Court: All right; go ahead.

A. Now, the next deal is Fox.

[fols. 1864-1866] Mr. Wright:

Q. That, I believe, with Fox you had a franchise that didn't expire until the 1938-1939 season?

A. The franchise was for three years.

Q. That was made before the Amusement Company took over, is that correct?

A. Yes, sir.

Q. What is the comparison between the last deal with Fox made by you and the first deal made by the Ruffin Amusement Company, Inc.; what would be a comparison between the 1938-1939 and 1939-1940 seasons?

A. It would be a comparison on this franchise against the present franchise we are operating under.

[fol. 1867] Q. What is the next company?

A. Fox.

Q. And did you explain your franchise you had made prior to the time?

A. Yes, so that that franchise the only one we could compare would be that you would have to have one picture gross because in my three year franchise we played sixteen pictures or fourteen and so on, they were on percentage.

[fol. 1868] Q. Just give that approximately your franchise with the contracts, what franchise they made then with Fox?

Mr. Waller: Are you taking his franchise as dated here?

Mr. Wright:

Q. What year?

A. Which year you want?

Q. The last year of your franchise and the first year of your connection.

A. The last year of my franchise was 1938, 9; six features at thirty-five per cent, $17.50 with a score of two and a half. Eight at thirty per cent against $17.50, a score of two and a half, ten at thirteen seventy-eight, score two and a half, balance at eleven *o* two, with a score of two and a half.

. . . . . .

[fol. 1869] Q. Go ahead.

A. In 1939-40 we *we* got the franchise for feature pictures and it was a flat rental, we thought at the time we were making a better deal.

Mr. Wright: Just a minute, I am objecting to what you thought. Just answer the question and read the comparative figures you have got there.

A. Ten at forty dollars.

Q. Will you read the figures and if there is a change?

A. Ten at twenty dollars, ten at fifteen dollars, balance at ten.

Q. Turn to the next company, this is the first year of the franchise.

A. This is the first year of the franchise and of course each year was stepped up a little.

Q. Of course under the basis of the franchise, which is in evidence; will you turn to the next company?

A. Warner Brothers, 1936-7. One feature at fifty per cent and the score was two a-d a half, and trailer was two dollars, one feature at thirty-five, trailer was two dollars and one feature at thirty-five trailer twelve dollars and score two and a half; three features at thirty per cent, trailer two, score two and a half. Twenty-two features at [fol. 1870] ten, trailer a dollar and a half, score two and a half, that was the Warner Brothers. From the first, one feature thirty-five per cent, trailer two dollars and I do not know the score, I imagine it was down. Four features at thirty per cent, trailer two dollars, twenty-two at ten dollars, trailer a dollar and a half. All of those are International Pictures.

Q. They were distributed by Warners?

A. Yes, sir, in 1937 and 8 we could not get together with Warner Brothers and did not buy their pictures in 1937-1938.

Q. What was the 1938-39 deal?

A. You mean—twenty-six feature pictures at eight twelve and score two fifty and tr-ilers one dollar.

Q. Is that the last comp-ny you have?

A. That is 1938-9 of course I have 1939-40 and 1940-41.

Q. That is all I care for, are there any other companies there?

A. Paramount.

Q. Will you read that one?

A. 1936-7 was five at ten fifty, six at thirteen, and two at nineteen dollars. 1937-8 fourteen features at forty per cent with a score of three dollars, eight features at sixteen, score three dollars, twenty-eight features at ten dollars and score three dollars.

[fol. 1871] Q. That the last one there?

A. Yes, sir.

Q. Now with respect to all these towns where you operated after you became affiliated with Mr. Stengel and Mr. Sudekum, you were able to get rid of the percentage deals for the ensuing season with Warner, RKO and Metro?

A. And Fox.

Q. And Fox, after your franchise?

A. That is right, but it cost us money by doing it, because we had more flat rental.

Mr. Wright: I move to strike that out.

The Court: I want to get the facts in this case, I do not care whose witness he is.

Mr. Wright: All I want to prove by him were these particular tabulations.

The Court: Go ahead and say all you have to say?

A. No, sir.

Mr. Wright: We do not object to any explanation he may make in response to the Court's inquiry.

[fol. 1872] The Court: I am asking him to explain it.

A. I can take Fox here and explain it to you this way. In 1938-9 we had Fox thirty-five per cent for six pictures and eight at thirty per cent. In 1939-40 we paid forty dollars for ten pictures. If we had to play those pictures on percentage, we would not have paid them forty dollars for the ten pictures, but we paid them ten other features at twenty, while if we had had the other deal it would have been thirty per cent, we would not have paid them that much money.

The Court: You didn't figure then that it was to your interest? To buy pictures on a flat basis against percentage?

A. There is more to it than just the flat basis. In other words, the major companies take up your Saturdays and Sundays and holidays, and your best days for playing, when they have one they do not care for.

The Court: A great deal depends on each particular contract you can make?

A. Yes, sir.

[fol. 1873] The Court: Considering the playing dates, etc.?

A. Yes, sir.

Mr. Wright:

Q. In the course of your negotiation with the film companies you have always tried to avoid percentage deals?

A. That is right.

Q. And play flat rentals wherever you have been able to do, have you not?

A. That is right.

Q. How much did Mr. Stengel receive for the services he rendered to the Ruffin Amusement Company after it was organized?

A. Mr. Stengel is paid a salary of fifty dollars a week.

Q. You are sure it is not more, or has not been more than that?

A. That is what he is drawing at the present time?

A. He did draw more before?

A. I couldn't say without my records.

Q. Might have been substantially more in 1937 and 1938 and 1939?

A. No, I don't think it could be, but it could be in 1937, I did not remember—he didn't draw a salary then.

Q. Your records as to what salary he drew would appear on the tax returns you filed?

[fol. 1874] A. That is right, in other words, I would have to have the records to tell you when his salary started.

Q. And if the tax returns show a higher payment, that would be the correct payment?

A. Yes, sir.

Mr. Armistead: I would like to ask, do you have the records?

Mr. Wright: We have those of the Ruffin Amusement Company.

Mr. Waller: The Ruffin Amusement Company is not a party to this case, and I think the Government ought to explain to us.

Mr. Wright: Very simple, I will be very glad to explain it to you, when the Attorney General writes a request.

The Court: On some interrogatories here they wanted to know the amounts that were paid in taxes, etc. for these different companies and I declined to grant this request for interrogatories on the amounts that were paid, on the ground that with the information that was available to the [fol. 1875] Attorney General, at his request, and I didn't see any reason that they should be made public at this time.

Go ahead.

[fol. 1876] Mr. Wright: I would like to offer these letters that have been previously identified; The first letter is dated December 15, 1938.

The Court: What Exhibit is that?

Mr. Wright: No. 239. It is from Mr. Ruffin to Mr. Stengel: (Reading)

"DEAR MR. STENGEL:

While in Memphis this week I find that there is more talk of competition in this section than ever before. There is still some talk of Joe Wiley possibly opening up next year against us at Hickman. Also it seems to be a certain fact that Mr. Henry has a lease on a building at Union City and has gone as far as making the down payment on his chairs, but before going any further he is waiting to see what product will be available for him for a three year deal.

Jimmy Pritchett of Universal stated to me that he was to meet his District Salesmanager at Nashville and see you and Mr. Sudekum Tuesday December 13th. I understand from a reliable source that unless they close a deal with you that he is instructed by his New York office to take a three year porposition from Mr. Henry. At this time I would suggest that in case you did make a deal with Universal, and if the contracts [fol. 1877] have not been signed that our clearance be brought out in the contracts as this past year our competitive points practically played every picture of any importance ahead of us notwithstanding our short commitment.

On most of my trips to Hickman I see Mr. Henry, but since letting Joe go I have not taken the time to go to his office to spend any time with him. I am sure that Mr. Henry's capital is limited, but he states on film row that Union City is not the only town in which he expects to go in competition to Mr. Sudekum. The thought occurs to me if Mr. Henry really is determined to get back into the show business would it be advisable to let him have Hickman back. It may be that he would not even want this town back.

For your information I am also advised by a boy from Covington who goes with a girl in Union City that they expect to have two new shows there soon, but she did not know who was going to open them. It could be possibly that one of these theatres is the one which Mr. Henry is contemplating an opening, and that Mr. Sudekum naturally would open the second house [fol. 1878] himself in case Mr. Henry would come in.

I am also advised by our manager at Milan that this week a stranger was in Milan with California license on his car looking over the situation and stating to some business men and also Jimmy Shoaf he was there for the purpose to consider another theatre.

During our Convention I talked with Mr. McCord, who is associated with Mr. Lightman, and he states that so far only one of their small town- was getting competition, but they expected to fight this competition at the start by putting up the same class house (shot-gun) as near the competitor's location as possible and operate same at ten cents, which operation would be separate and distinct from their other house in the town.

I wish to remain

Sincerely yours • • •"

The Court: I will admit the evidence, not for the purpose of proving the facts stated in the exhibit but bearing on the relationship and activities of Mr. Stengel.

Mr. Wright: The next is Exhibit No. 240, a letter dated December 17, 1938, from Mr. Ruffin to Mr. Stengel, which is [fol. 1879] as follows: (Reading)

"DEAR MR. STENGEL:

With reference to our phone conversation of this morning in regard to Mr. J. Dee Henry of Hickman, Kentucky, beg to advise that rather than put anything into writing I called him after talking to you and talked to him along the same lines as my conversation with you and Mr. Sudekum. He stated that he and Joe were going to Memphis Monday and made an appointment to see me here at the office early Monday morning.

I wish to remain

Yours very truly • • •"

The next letter is dated December 18, 1938, marked Government Exhibit No. 241, and is as follows: (Reading)

"DEAR MR. STENGEL:

As I advised you as to the appointment I had with Mr. Henry and Joe Wiley of Hickman, Kentucky, beg to advise that they were here this morning promptly at eight-thirty.

My conversation with them was along the lines as discussed over the phone with you and Mr. Sudekum Saturday. I find that they are very anxious to get [fol. 1880] back into the show business and really sorry that they sold Hickman. They have combed this territory very thoroughly and have not found anything that would justify them going into, except competitive points and they do not seem to be so keen for that now. Since being blocked at Union City with the second house their thoughts have turned to Mayfield, Kentucky, but I explained to both of them that we were not interested in such a setup, but that at any time they had anything worth while, I would be glad to discuss it with them and if advisable possibly we would be willing to go into partnership.

After the holidays business I am sure that we will have a considerable slump in business, and at this time I have in mind doing some more scouting myself, expecially centering on Dresden, that is, if you think advisable.

I wish to remain

Sincerely ours * * *"

The next is a letter from Mr. Stengel to Mr. Ruffin, in reply, dated December 21, 1938, marked Government Exhibit No. 242, and is as follows: (Reading)

[fol. 1881] "Dear Mr. Ruffin:

I have your letter with regard to your discussion with Mr. Henry and Mr. Wiley. I do hope that they will find some place where they can locate away from our particular territory.

I think you are absolutely right in following up the Dresden situation sometime after the first of the year.

I am very happy to know that your Christmas Party and Dinner was so successful. Kindest regards, * * *"

Next, a letter of May 9, 1939 from Mr. Stengel to Mr. Ruffin, which has been identified as Government Exhibit No. 244, from Mr. Ruffin as to the Paramount franchise, and reads as follows: (Reading)

"Dear Mr. Ruffin:

As you know, under the terms of our franchise, we have the privilege of playing any feature photoplay as

a repeat run in any of the theatres. This repeat run is to be paid for at the same price as HOPALONG Westerns and is to represent additional business over and above our regular commitment.

We have today signed a rider to the effect that we [fol. 1882] agree to notify Paramount within thirty days after the conclusion of the initial exhibition of each feature photoplay in any theatre as to whether or not this picture is to be used second run in that particular theatre or town.

If you elect to repeat a run of any picture, it is necessary that the picture be dated within ninety days of the first run exhibition. It is, of course, also necessary that you notify Paramount in writing within thirty days after the first run exhibition of your intent to use the picture.

Trusting this explanation is clear to you, we are.

* * *"

Then there is a letter from Mr. Ruffin to Mr. Stengel, dated January 7, 1939, Government Exhibit No. 2437 reading as follows: (Reading)

"Dear Mr. Stengel:

I am just in receipt of a letter from our manager at Martin stating that the Star Mail Route Man from Hickman, Kentucky told him last night that Mr. Henry had closed a contract and lease for the J. Gibbs building at Union City, Tennessee to open a theatre at an early date.

[fol. 1883] He further states that the building is located directly across the street from the Capitol, and is now being used as a wrestling arena.

The above is all the information which I have been able to secure. I thought advisable to pass same on to you and Mr. Sudekum.

I wish to remain

Sincerely yours."

There are two more letters that I thought I had identified, but I haven't.

Q. I will show you a copy of a letter dated August 12, 1939, from you to Mr. Stengel, and ask you if that is a copy of a letter you wrote to Mr. Stengel on that date?

A. That is right.

Q. I show you a letter dated August 14, 1939, from him to you and ask you if that is a reply you received from Mr. Stengel?

A. That is right.

Mr. Wright: I will ask to have these marked as the Government's next exhibits.

The Clerk: Exhibits Nos. 245 and 246.

Mr. Wright: The letter of August 12th, from Mr. Ruffin to Mr. Stengel will be Government Exhibit No. 245, and [fol. 1884] reads as follows: (Reading)

"Dear Mr. Stengel:

Since opening our second house at Hickman which has been a problem as to what really would be the best thing for us to do to hold up our grosses. In operating the little house full time for the first two weeks, we did not break even, and since then have only been operating on Friday and Saturday with one change of program. For the past two weeks our grosses have dropped under thirty dollars ($30.00) the average change of program is costing us: feature $10.00; two reels of shorts, $4.00; Serial, $4.00 plus average of $6.00 per week salary, pluss express, advertising, lights and water, insurance, taxes, and other operating expenses. Our admission prices for the small house are: adults 16¢; children, 10¢.

Since the opening of the little theatre our policy at the Ritz Theatre has been six days a week, admission prices main floor, adults 27¢ and children 10¢; Balcony, being divided for Colored and White, admission prices, adults, 16¢ and children, 10¢.

On Saturday we are continuing to run double features with a serial, reserving the entire balcony for our [fol. 1885] Colored trade, as it seems this is the only day of the week we can get any Colored business, using the Main floor for Whites only; admission prices, adults 27¢ and children 10¢.

Conditions have not been any too good at Hickman, softball cutting in heavily as they are using case giveaways.

As we have kept the little house open this long, would you think it advisable to operate same through the fall

months and thereafter only as it would justify. It would not be to our advantage to convert this building into a store building as the rent in Hickman is entirely too cheap. As we will need equipment for our new theatre at Benton, do you think it would be advisable and safe to consider dismantling this theatre so as to use some of this equipment at Benton, or forget our investment at Hickman and keep same intact for assurance against competition? I would welcome any and all suggestions that you may have to offer.

Thanking you, I wish to remain,

Yours very truly * * *"

The reply from Mr. Stengel is dated August 14, 1939, [fol. 1886] Government Exhibit No. 246, and reads as follows: (Reading)

"Dear Mr. Ruffin:

I have your letter with regard to the poor business in the second house at Hickman, Kentucky.

In view of these bad business conditions, I believe it would be a good idea to close the house until some later date. I would not remove the equipment as, when conditions improve, you might want to re-open it.

Yours very truly * * *"

[fol. 1887] Mr. Wright: That is all.

Cross-examination.

By Mr. Waller, for Defendant Crescent:

Q. Mr. Ruffin, I hand you a letter dated January 14, 1939, addressed to you, and signed J. Dee Henry. I will ask you if you received that letter from Mr. Henry?

A. Yes sir, I did.

Q. Shortly after the date it bears there?

A. Yes sir; in other words, the next day.

Q. That was about four months after the Ruffin Amusements had bought Mr. Henry's theatre at Hickman, Kentucky, with the agreement that he would not compete?

A. That is right.

Q. At the time you bought that theatre, did Mr. Henry make any statement as to his future prospects and state

whether or not he intended to go back into the picture business?

A. When I bought Mr. Henry out, he stated that it was taking too much time from his insurance business and that he wanted to get out of the theatre business and he invited me over to sell to me.

Mr. Waller: I offer this letter as Defendant's General Exhibit No. 72.

Q. Mr. Ruffin, what was Mr. Henry's nephew's name?

A. Joe Wiley.

[fol. 1888] Q. That is the same Joe Wiley that is referred to in this letter?

A. Yes sir.

Q. At the time you bought the Hickman, Kentucky Theatre, did you give Joe Wiley a job?

A. Yes sir.

Q. What experience did you have with him, how long was he with you?

A. I gave him a job as Manager and retained him until sometime in October. I started operating the latter part of September and it was almost impossible to get Joe Wiley to run the Theatre according to the way I wanted it and it was necessary to relieve him because he wanted to run it like Mr. Henry wanted it run.

Mr. Waller: I will read this letter, your Honor; it is dated January 14, 1939, and is as follows:

(Reading):

"Dear Mr. Ruffin:

"Referring to our conversation the other night in which I told you that Joe Wiley was considering installing a show in Hickman, he already has the booth equipment, it is his intention to start this work in the next week or ten days.

"I am interested in both of you making money, he does not have one cent to lose, or the folks backing him [fol. 1889] does not have any that they want to lose, he figures that he can run pictures at a price and with the Saturday business make a go of it, that is his problem and not mine.

"I wish that you two would get together and see if there is not something that you can work out satis-

factory to both of you, one show will pay in Hickman but not two, somebody or both are going to lose some money, if there is anyway that I can be of any help, call upon me.

"Yours very truly. * * *"

Q. Now, as the result of receiving that letter, did you confer with Mr. Henry or Mr. Wiley?

A. I made a special trip to Hickman to confer with Mr. Henry.

Q. What did you find out there?

A. We talked at length, one whole afternoon.

Q. You and Mr. Henry.

A. Mr. Henry and myself. At that time he had bought a building, although it was in Joe Wiley's name.

Mr. Wright: Just a minute. I object to the testimony as to what Mr. Henry had done, he can give the conversation that occurred, but what he had done is incompetent. [fol. 1890] The Court: How do you know he had bought the building?

A. It was commonly known on the street there. I didn't, of course, go to the Court House.

The Court: Objection sustained.

Mr. Waller:

Q. Just state what conversation you had with Mr. Henry?

A. I went to Hickman and still followed up the letter and explained to him how unfair it was to treat me that way when I paid him the price he asked; in other words, when we traded I gave him just what he asked. He went on to say that Joe had to make a living and he figured that was the best way he could make it, was to put up a house in Hickman. We discussed at length that Hickman wouldn't stand two theatres. Then the conversation drifted to Union City, and he stated that "If you can get me $6,000.00 profit over and above all I have invested at Union City, and if Sudekum will take my other nephew and give him a life time job as manager of one of his theatres in Union City, and you take Joe Wiley and make him Manager at Hickman, Kentucky for a life time job, I will see that the theatre here in Hickman isn't completed and is converted back to a store building.

Q. Did you accept the pay-off proposition or not?

A. No, I couldn't accept it.

[fol. 1891] Q. What did you do?

A. As I saw that there was no way to protect myself and protect the investment I had in Hickman, Kentucky, and if it was necessary for the second house in Hickman, if it was necessary for me to protect what I had paid Mr. Henry ~~for the~~ Ritz Theatre——

Mr. Wright: I don't think that is responsive to the question. The question is, what did he do, not argue about it.

Mr. Waller:

Q. What did you do and why?

A. In other words, I opened the second house in Hickman, myself.

Q. Now, Mr. Ruffin, there was a letter that was introduced by the Government in regard to your grosses. I believe you wrote a letter to Mr. Stengel?

A. Yes sir.

The Court: Well, we will adjourn now.

(Recess to 1:30 P. M.)

[fol. 1892] Afternoon Session

W. F. Ruffin resumed the stand for further cross-examination.

By Mr. Waller:

Q. Mr. Ruffin, in your letter of August 12th, 1939 to Mr. Stengel in regard to your second house at Hickman, Kentucky you state that "Conditions have not been too good at Hickman. Soft ball cutting in heavily. They are using cash give-aways." Did you in the theatre business suffer from soft ball competition as well as other moving picture competition?

A. Yes, that is right.

Q. Down in West Tennessee soft ball got to be quite a fad, more than in other places, didn't it?

A. That is right.

Q. You asked Mr. Stengel or mentioned to Mr. Stengel—"It has been a problem to know what to do to hold up our grosses." I will ask you whether or not in a town where

you have no competition, it is necessary to experiment with admission prices to see what admission prices bring the greatest grosses?

A. Yes. I might add this: It is easier to lower prices than it is to raise them. If you once get them lowered it is hard to raise them back.

Q. Of course, the higher the admission price the smaller the volume and it is a question of getting the proper admission price to get the greatest gross?

[fol. 1893] A. And in the towns that we operate in, they are all small towns so we don't have the advantage of volume on cheap admissions.

Q. You were asked about the advantage of flat rentals as distinguished from percentage. I will ask you whether or not the advantage of flat rentals is in regard to the latitude that you have in dating your pictures and playing off the pictures when you want to?

A. That is true, after all, in small towns if it wasn't for the Saturday business a lot of those towns wouldn't be operating, and naturally we have only got a few days outside of Saturdays during the rest of the time that we can gross any good money, that is, like on Christmas, New Year's and Thanksgiving, and the major companies have gotten very contrary about their percentage pictures. They want them either on Saturday and Sunday or Sunday and Monday, so if you come to buy a big picture, if the picture is for two days, they want you to play it Saturday and Sunday and Monday.

Q. You said something on our direct examination about these flat rentals in 1937-1938 contract with Loews and Fox; that if you had had a percentage contract you would have paid less money, is that correct?

A. That is correct.

Q. You said you had those figured?

A. Yes sir.

Q. Can you give us those figures?

A. Yes sir.

[fols. 1894-1895] Mr. Wright: Before the figures are offered, do I understand that he is now offering some figures which will contradict the figures that were submitted by the distributors for the actual play-offs under the contract? We intend to offer those answers to interrogatories 15 and 16, which show, purport to show——

The Court: No. He is just offering them for comparison, as I understand.

Mr. Wright: But what I wanted to get clear was whether this data that he is talking about now has already been presumably submitted by each distributor in answer to interrogatories 15 and 16 on these play-off sheets, some of which your Honor has seen—I presume these are the best evidence of the actual rentals paid and I wanted to know at this time whether there was going to be an attempt to show that the distributors had made some errors in compiling these sheets. If not, I think these sheets tell the story, rather than what he has here.

Mr. Waller: I don't see why they would be any better than these.

. . . . . .

[fol. 1896] The Court: All right. Go ahead.

[fol. 1897] A. In 1937-1938 at Newbern with Loews we had four features at $70.00. These four features cost $280.00 and we grossed $683.73, which showed that we played those pictures 41%; whereas the year before we had the pictures on 40%, and the second group were sold to us six at $25.00, where the second group in 1937-1938 were sold to us at $35.00. So it would have been much better in 1937-1938 by quite a few hundred dollars if we had played the pictures on percentage.

By Mr. Waller:

Q. By that you mean on the same schedule?

A. On the same schedule, because they not only charged us four percentage pictures at $70.00 but increased each of the other allocations. You see, we have the right to play the pictures when we wanted to.

Q. That was Loews?

A. That is Loews.

Q. Did you make the same statement for——

A. On the 1938-1939 product of Loews we paid Loews on the four top pictures 63½%.

Q. You mean that is what you actually paid them?

A. Paying them $70.00 a picture amounted to 63½%.

Q. And the percentage on your previous contract was 40%?

A. Yes. Now, on the 1940-1941—we now have gone back to the four top pictures at 40%. On Strike Up The Band at Newbern they only got $32.16 instead of $70.00, and on Philadelphia Story they got $30.80 instead of $70.00.

[fol. 1898] Q. Now then, what about Fox? Did you also give flat rental on Fox's?

A. Yes, percentage pictures of Fox at Newburn in 1937-1938 cost us $26.03 and in 1938-1939 they cost us $38.16, that is, the average, whereas in 1939-40 we paid them for the top pictures $40.00.

Q. Now, 1939-1940 was the new franchise that was negotiated after the Ruffin Amusement Company was formed?

A. That is right.

By the Court:

Q. What did it cost you in 1938-1939?

A. 1938-1939 cost us $38.16.

Q. Was that on a percentage basis?

A. Yes sir, and the second group, by getting that privilege, was raised from $13.78 to $20.00.

By Mr. Waller:

Q. You mean under the franchise?

A. Yes sir, the second group was, instead of being $13.78, was $20.00.

Mr. Waller: Q. Now, Mr. Ruffin, in your experience would you say that the time of the year in which you make a deal with the film companies has anything to do with the terms you are able to get?

A. The later that you buy pictures naturally the cheaper you can buy them because pictures are just like any other [fol. 1899] merchandise. The later that you run a picture the less you can gross on it.

Q. Now, what is your policy now, your practice in playing pictures with reference to whether they are played as early in the season as when you operated individually?

A. I am playing pictures from sixty to ninety days later than I did when I was in the business as an independent.

Q. In general would you say in your experience, other things being equal, that the man that plays the pictures the earliest has to pay the biggest price for them?

A. To get that privilege you have to pay. In other words, you have to buy the product early to have it approved in

time to start dating on release date and usually those products have been sold in the past before any reviews or any pictures have been released.

Q. Now, these release seasons start after or about September 1st, don't they?

A. Except Fox heretofore has always started theirs in August.

Q. So in order to get going at the beginning of the release season you have got to make the deals before that time and get them approved?

A. That is right.

Q. Now, West Tennessee is an agricultural section, isn't it?

A. Strictly. We depend on the rural sections.

Q. Is cotton a pretty important crop?

[fol. 1900] A. At Covington, Newburn and Halls cotton is the principal crop. At Martin, and Greenfield they don't raise as much cotton but it is more or less strawberries and sweet potatoes, and the, of course—but that is in the Chickasaw and it doesn't come in. Humboldt and Milan, of course, are in the trucking section.

Q. Now, does the condition of the cotton crop in West Tennessee in a particular year have any effect of the money that is in the pockets of the people that want to go to picture shows?

A. It has all to do with it. I was born and reared at Covington and it depends on the cotton crop.

Q. Now, if you have a season when there has been a poor cotton crop and you are going to buy pictures for the coming season, do you take that into consideration in the offers that you make to the film companies and in your negotiations with the film companies?

A. We have to do that because in the days before air-conditioning the theatres in small towns used to close up in the summer and you depend strictly on your fall business. In other words, if you don't get your business in the fall you will show a loss for the year.

Q. Now, even with air-conditioning if you come into a season and you are going to try to buy pictures for the coming year and there has been a bad crop, what effect does [fol. 1901] that have on the way that you trade for your pictures?

A. We take that into consideration and if we can't buy our pictures accordingly, why, we just don't rush into any contracts because they have to be bought right.

[fol. 1902] Q. And would you or not say that prices for pictures fluctuate, to some extent at least, with conditions?

A. There is no set value as to the price of any picture; it is based on possibilities as to what the town will gross, or what the surrounding territory or what the town depends on for revenue.

Q. Now, does that vary from year to year and from season to season?

A. Very much.

Q. I will ask you if in the summer of 1937, you had any boll weavil or army worm trouble down in West Tennessee?

A. The best I remember, we had the army worm which shortened our cotton crop considerably; usually the cotton is out of the field by Christmas; and mostly that year the cotton was out by the latter part of November.

Q. Now, Mr. Ruffin, if you make a deal for pictures with one of these film companies and you find from your actual experience in showing those pictures that you paid more than is reasonable in your opinion, and when you go onto the next season does your past experience have anything to do with your negotiations for the coming season?

A. When I did all my buying myself, I never would enter into a deal until I had figured up as to what I had grossed on that company's product the preceding year, as no film [fol. 1903] salesman will call on you unless he has got the cut-off on your town as to how you paid in the past. We have always bought pictures on the confidence we had in the particular company.

Q. Is the price you pay for pictures one season generally set up and used as a precedent in your negotiations for the next season's product?

A. Every year the salesmen come around for an increase; and we say, why, we will go in and give them an increase for a few years; then it just comes to a point that we just give, and give, and that is the reason, a lot of times, that we are not able to trade with the major companies, and we are forced to leave them out, because we are not able to pay for the product what they ask.

Q. If you leave the major companies out for a time, then have you in your experience found it possible to make much better deals from your standpoint than your previous deal?

A. Usually they sell them on that precedent that you paid in the past, but if you are not too anxious to buy and know what you can pay for pictures, you usually can make a better deal, because, after all, these film companies don't get any revenue out of pictures if you don't play them.

Q. And if they are left out one year, usually they are anxious the next year?

[fol. 1904] A. By leaving them out a year we can usually pick up what we lost in the previous year to apply on that product, you see.

Q. In other words, you are able to get two seasons' product instead of one?

A. Instead of one.

Q. Now, before your corporation was formed, were you able at the end of a film season sometimes to trade off some of the poorer pictures you hadn't wanted to play?

A. That was our ace in the hole; we would usually work our contract up until the trade-off; and it was very seldom that we ever bought a new contract if we had some pictures that were not good, "clucks," as we call them, why, we were able to cancel the unplayed portion before we bought a new contract; we have had some companies that would do that. Of course, a few years ago, they cut us out with "the reduction department is closed" or "the cancellation department is closed"

Q. I mean, in your experience as an individual, before you had this corporation, did you tell these companies you wouldn't make a deal with them for the next year if they [fol. 1905] were going to force you to play these "cluck" pictures?

A. In making deals I have been able to get a cancellation.

Q. That was part of the deal?

A. That was part of the deal; that was taken into consideration.

Q. Of course, if you didn't make a deal, you would go ahead and play the pictures, is that correct?

A. That is right.

Q. Now, Mr. Ruffin, when you formed this corporation and sold half of the stock in it, what was your agreement with Mr. Stengel about the management?

A. The agreement with Mr. Stengel and Mr. Sudekum at the time that the deal was closed was that I would run my business just like I had in the past; I would do my

own booking, keep my own books, and if the set of books I was using and the system of bookkeeping satisfied me, it satisfied them, and that they wanted me to just continue running my business just like I had run it before I sold them my business.

Q. When was the film buying business turned over to Mr. Stengel?

A. January, 1937, is when we formed our corporation. In May, 1937, we decided to build the theater in Green- [fol. 1906] field; in May, 1937, I bought Mr. Shepherd's interest in the Chickasaw Amusement in Milan and Humboldt; and in doing all these duties and running the office and keeping the books there, it was impossible for me to do the buying and continue on managing the theaters like they should be, with managers in every town you operate. But I have always had the policy to, as often as we could, visit these particular towns and the manager myself to see how they are getting along and not to leave it with that particular manager. Another reason is, Covington is my home, and it is only a- hour's ride from Memphis to Covington. Well, I don't know how many film salesmen they have with them; but it seems as soon as a film salesman gets back, they run up to Covington to try out what their managers have told them, to see if it would work. Well; if it was a salesman that was a stranger, my wife and I had them in our home as a guest, and when a salesman sees a chance for a contract, they would stay as long as necessary to get the contract; and some of them stayed as long as a week; and if I had kept that up I don't believe I would have had a dime.

. . . . . .

[fol. 1907] Mr. Waller:

Q. One question I am reminded to ask you, Mr. Ruffin: Whether you play pictures later now than you formerly did; I believe I asked you that and you said you did?

A. Yes, sir.

Q. Does the corporation buy them later than you used to buy them as an individual?

A. Yes, sir.

Cross-examination.

Mr. Raftery:

—. By the way, these salesmen were out of what city?

A. St. Louis.

Q. How far is St. Louis from Covington?

A. Something over 300 miles, I would say.

Q. And how far is Covington from Atlanta?

A. Just about the same distance. I have checked up on that, and express from Atlanta to Covington, and the towns [fol. 1908] we are operating in is just about equal; there isn't any difference.

Q. Your towns are a good long distance from either Atlanta or St. Louis?

A. That is right.

Q. Now, let's take your Chickasaw towns: How big a town is Alamo, Tennessee?

A. Alamo is about 1100.

Q. You have one theater there?

A. Yes.

Q. And no opposition?

A. No opposition.

Q. How big is that theater?

A. Including the balcony, about 270 seats, I think.

[fol. 1909] Q. Now the next town I see is Benton, Kentucky?

A. Benton, Kentucky.

Q. You have a town here, how big a town is Benton, Kentucky?

A. Benton in the last couple of years has about doubled its population, it is around two thousand now, it has been on the upgrade due to that Kentucky dam at Gilbertsville, two thousand now.

Q. About two thousand?

A. Yes, sir.

Q. What is the colored population in each of these towns?

A. At Benton, Kentucky, there are only three or four families of negroes there.

Q. Alamo?

A. Alamo, I would say thirty percent or more of the population are negroes.

Q. Have you provision in your theatre at Alamo for colored people?

A. Yes, sir.

Q. And how about Humboldt, Tennessee, how big a town is that?

A. Humboldt is about just about fifteen hundred.

Q. And Halls, Tennessee?

A. Halls is around fifteen hundred.

Q. How big is your new theatre?

[fol. 1910] A. Four hundred and sixty seats, including the balcony.

Q. That Rex theatre in Humboldt?

A. Between six hundred and eighty and seven hundred.

Q. And Milan, Tennessee, how big a town is that?

A. Milan, I believe the last census gave it about thirty-one hundred.

Q. How big is your theatre there?

A. The Milan theatre there is around five hundred seats, including the balcony.

Q. And in each of these towns you have no competition?

A. No, sir.

Q. Now let's look sown at the Ruffin towns, you have two towns, Covington?

A. Thirty-five hundred.

Q. One theater in the town?

A. One theatre.

Q. How big is that theatre?

A. Seven hundred and eighty-fiine seats.

Q. And at Greenville, Tennessee?

A. Greenville is fifteen hundred.

Q. One theatre?

A. One theatre.

Q. The Palace?

[fol. 1911] A. The Palace theatre.

Q. How big a theatre is that?

A. About three hundred and sixty seats, including the balcony.

Q. And Martin, Tennessee?

A. Martin is thirty-five hundred.

Q. One theatre?

A. One theatre.

Q. The Capitol?

A. Capitol Theater.

Q. How big is that?

A. About five hundred seats, including the balcony.

Q. Newbern, Tennessee.

A. Newbern is seventeen hundred.

Q. And one theatre?
A. One theatre.
Q. The Palace?
A. Palace.
Q. How big is that?
A. About three hundred and fifty seats.
Q. You have no competition in any of those towns?
A. No, sir.
Q. And on the allocation of film rentals under the United Artists contract you worked that out with Mr. Stengel or Mr. Sudekum?
[fol. 1912] A. I have always worked that out with Mr. Stengel.
Q. And the price you are to pay for the product bought by you from the United Artists on that contract?
A. That is right.
Q. Under the contracts that have been made since Stengel was in there.
Q. And that was determined solely and wholly by you and Mr. Stengel?
A. That is correct.
Q. And Mr. Stengel or whoever it was, paid the United Artists?
A. Since the United Artists contract was approved, and as soon as it was approved, it was paid. Then we had notice of the approval by the United Artists contract, we mailed our check in the amount for the towns to the Crescent Amusement Company, or in other words, we didn't wait until one was dated, we mailed our check to them for it when we got the contract.
Q. You mailed the check, you had a separate price for each picture?
A. For each picture and each town.
Q. For each town?
A. And the total amount and number of pictures.
Q. I believe you said you had that 1938-1939 was a contract and that the number of pictures was stepped up to [fol. 1913] twelve, fourteen and next fifteen?
A. Yes, sir.
Q. This contract that is in evidence happens to be for the 1940-41 season; on that there are fifteen pictures listed?
A. Yes, sir.
Q. It is a fact that three of those pictures were not made, during the contract, Tanks A Million, Niagara Falls, and

Night Music, those pictures were not made by the producers?

A. I don't know that.

Q. They have not been made available?

A. That is right, they have not been made available.

Q. And you have had twelve made available under this contract how much of your playing time in any one of your towns does United Artists play under a contract like that, a series of pictures of product?

A. Oh might very well that you can have double features on Saturdays, which won't be ten per cent.

Q. How many days do you play these United Artists Pictures?

A. From one to two days, about twelve pictures.

Q. How many days maximum?

A. The maximum is two days.

The Court: Twenty-four days maximum?

Mr. Raftery:

[fol. 1914] Q. Did you run Sunday?

A. All except Covington, Milan and Humboldt.

Q. You were telling His Honor about Saturday business; isn't it wellknown in the theater business that in the average town where you play on Sunday, Sunday's receipts will average about three-tenths of your business?

A. I would say yes, sir, in an average small town they will usually gross as much on Saturday as they will gross during the rest of the week without Sunday.

Q. In your type of towns where you haven't Sunday, Saturday is fifty per cent of your week?

A. Yes, sir.

Q. Where you have Sunday what does the amount run to?

A. I would say yes, sir, where you have a town, it has got down now to Sunday operati[illegible] Monday is the worst day of the week, Sunday's business compared to Saturday is the next day of the week.

Q. Saturday is still your best day?

A. Still the best day.

Q. And on these percentage pictures, every distributor sells percentage, if he sells percentage, wants Saturday, or Sunday or both for playing time?

[fol. 1915] A. That is right.

. . . . . .

Q. What type picture is the one that is liked, is the one you try to take?

A. We have found a western, I tried to do without Westerns on Saturday, but we found out you have to have the Western pictures regardless of whether you double feature or not.

Q. Mr. Ruffin is there any obligation on your part as an [fol. 1916] exhibitor to take product of any distributor?

A. No, sir, and it is no obligation on the distributor to sell that product.

Q. And you feel free at any time you want to leave any distributor out of it out of any town you operate?

A. I have been doing it. In other words, Paramount was out of my operations five years and since I have been operating I have had to leave Loews out twice.

. . . . . .

Q. You have left United Artists out of your trades?

A. Yes, sir, because I couldn't get together with that Branch manager of yours over there, Featherstein, he wouldn't come to reasonable terms.

Q. He wouldn't come to your terms?

A. Yes, and the prices wasn't where I could use it. I am used to it.

Q. And you want to buy the product the same from United Artists——

[fol. 1917] A. I didn't get that?

Q. I will withdraw it. As a matter of fact, Mr. Ruffin, you have to pay some companies a little more than you pay others, do you not?

A. Yes, sir. In other words, I don't expect I have any two contracts identical, although I have had salesmen that have offered to sell me what I would pay the other company, because they would always pick out a company whose product was better than theirs, from the figures I heard.

Q. From the figures I heard Mr. Wright reading about Metro, you paid Metro some seventy dollars.

A. Yes, sir, seventy dollars flat.

Q. Whether you paid on the flat basis or paid on percentage of your top pictures, didn't the salesman, when he

made a flat offer to you, try to arrive at a figure on what he would get on percentage for them if the flat was used instead of a percentage?

A. That is right.

Mr. Wright: Your Honor please, I think that is something that would be for the salesman to testify to.

The Court: What was the basis of your information?

Mr. Raftery:

[fol. 1918] Q. Is that what the salesman asked you for? If the picture is on a flat basis, as to the manner of showing, doesn't he figure on what the picture would earn if it was on a percentage, and if that is not a precedent in the business?

A. Yes, sir. They work towards the end of what any particular picture would earn. The whole business is a gamble, it is a guess.

* * * * * * *

[fol. 1919] Mr. Wright: If the Court please, I want to see the document he has testified from.

A. Yes, sir, this is just a copy of a letter you have.

[fol. 1920] Cross-examination.

By Mr. Frolich:

Q. Mr. Ruffin, you testified this morning with reference to a compilation which is Government Exhibit No. 236, regarding the rental paid for your Theatre in Newbern to the Columbia Pictures Corporation for the season 1934-1935, down to and including the season of 1940-1941. You recall that, don't you?

A. Yes, sir.

Q. Now, I show you a group of contracts between the Ruffin Amusement Company and the Columbia Pictures Corporation for Newbern, Tennessee, and I ask you whether these contain your signatures? Please look at the little white sheet in here.

A. All of them bear my signature, except this one of Mr. Stengel's.

Q. These represent the contracts that were entered into by your Company, Ruffin Amusement Company with the Columbia Pictures Corporation for Newbern?

A. I didn't notice to see. It is considered so.

Q. Those all bear your signature from 1932 to 1940?

A. Yes, sir.

Q. Now, I will ask you, Mr. Ruffin whether it isn't a fact that after the contract of 1936-1937 the Ruffin Amusement Company took over Columbia's product for the following season under an agreement made between it and the Chickasaw Amusement Company and Ruffin Amusenrent Company to salvage $750.00 worth of unplayed product of an [fol. 1921] exhibitor, or two exhibitors, H. K. Perry and C. H. Lewis in Alamo, Tennessee?

A. I think that is correct.

Q. In other words, these two exhibitors had not carried out their contracts with Columbia Pictures in Alamo, Tennessee, prior to 1937 or during 1937?

A. Well, the reason of that is, those two exhibitors sold the theatre to the Chickasaw Amusement Company.

Q. And the Chickasaw Amusement Company took over the unplayed portion of the contract?

A. No, the Chickasaw Amusement Company assumed no contracts whatsoever in that town.

Q. Well, what did—How was the arrangement made for the $750.00?

A. In the regular selling season, that is for the year—What season is that, now?

Q. 1937-1938?

A. 1937 and 1938, for that year's product we had not been able to get together with Columbia and wasn't playing Columbia's product.

Q. In Newbern?

A. Wasn't playing it in any of the towns. In December, the Chickasaw Amusement Company bought the theatre at Alamo from those two exhibitors, Lewis and Perry, who had Loew's and the reason they were forced to sell was on account of the unreasonable prices they were paying for [fol. 1922] films. I didn't go to Alamo to buy the theatre, they came to me at Covington to sell it to me. I looked over the contracts and I realized I couldn't pay the prices. I went to Memphis, to your Branch Office and I saw the Branch Manager, Mr. Rogers, and I told him I wanted to complete the contract but there would have to be some kind of an adjustment. Mr. Rogers told me if I couldn't play the contract as it was, he would rather for me not to play it at all. So I didn't play it at all. And the next thing I

knew, through the Memphis paper, I saw there was a suit filed by the Columbia Pictures Corporation against these two exhibitors and the Chickasaw Amusement Company and Stengel and Sudekum and myself. The reason that we were included in the suit is that they figured possibly we hadn't paid those two exhibitors all we owed them for the equipment.

Q. That you had taken over?

A. Yes, sir. We were then operating the theatre. Then the suit went on and after numerous trips to Memphis and talking with their attorney and Mr. Rogers and with my attorney, I came to the conclusion it would be foolish on my part to see Mr. Lewis, who was the father-in-law of Mr. Perry, have to pay around $1400.00 for films he didn't have a theatre to play them in. And that is the way the suit was settled, in agreeing to play the $750.00 worth of product in any of the towns we operated in. The way the prices were made, they were just the schedule prices set up for [fol. 1923] each town, but we didn't have to play them in Alamo or Newbern, but anywhere we wanted to play them we could play them.

Q. So that the schedule of prices on this deal that you got from this man for 1937-1938, represented a schedule of prices that was arrived at by adjustment?

A. By an adjustment of the lawsuit.

Q. In the following year, 1938—No, 1939-1940, do you recall that there was a similar adjustment with reference to another situation?

A. Yes, sir.

Q. What was that situation, do you remember?

A. It was with reference to the towns that I was operating in.

Q. Was that Union City? Was Mr. Henry in Union City?

A. I don't believe it was Union City.

Q. Look at this and see if it refreshes your recollection.

A. I didn't make that contract.

Q. Didn't the Ruffin Amusement Company take over a part of the commitment of that contract?

A. Yes, sir.

Q. Do you recall that the prior commitment was for $2,000.00?

A. Yes, sir.

Q. And under that commitment—What town was it for?

[fol. 1924] A. I don't know.

Q. Suppose I refresh your recollection by showing you a document which Mr. Stengel entered into with reference to this commitment? I show you these towns. Do you see Newbern on this list of towns?

A. Newbern, yes.

Q. You played it in Newbern, the proportionate part of the $2,000.00 commitment, under the schedule?

A. The schedule prices of all the towns, yes, sir, that is right.

Q. So that the film rental that you paid for the 1939-1940 contract represented the actual play-off on a part of the commitment in settlement and adjustment of a controversy in Union City?

A. I wouldn't say Union City.

Q. In some other city, some city other than Newbern?

A. That is right.

Q. In other words, the very last contract that your Company entered into with Columbia in the ordinary and usual course of business, was the 1936-1937 contract, wasn't it?

A. No, the usual course of business, was 1940-1941.

Q. In 1940-1941?

A. Yes.

Q. That contract is not in evidence, I haven't got it. But I mean, up to this point, until 1939-1940?

A. 1936-1937 was, yes.

[fol. 1925] Q. Handled in the ordinary and normal manner?

A. Yes sir, that is right.

Mr. Frolich: I would like to offer in evidence Columbia Exhibit No. C-43.

Re-direct examination.

By Mr. Wright, for the Government:

Q. Can you tell us when these other theatres that are mentioned here were acquired? That is, the theatre at Greenfield; what was the date of that acquisition?

A. The theatre building was built, we built a building and opened it, as well as I remember, on July 25, 1937.

Q. That was built by your corporation?

A. It was built by the Ruffin Corporation.

Q. Then the Humboldt Theatre was taken over in September, 1938?

A. No; just two years ago, September, 1939.

Q. And the theatre at Halls, Tennessee, was acquired when?

A. The opening was the first part of December, 1939, as well as I remember.

Q. December, 1939.

Mr. Wright: I withdraw the three Exhibits relating to Halls, I think, and Greenfield—They are Government Exhibits Nos. 233, 234 and 237.

The Court: What are those exhibits?

Mr. Wright: Those are the tabulations for those towns [fol. 1926] which were acquired subsequent to the formation of the Rockwood Amusement Company. so that there could be no before-andafter comparison because he did not operate them subsequently.

The Court: Who owns the theatre at Alamo?

A. Chickasaw Amusement Company.

The Court: Humboldt?

A. Chickasaw Amusement Company.

The Court: Halls?

A. Ruffin Amusement Company.

The Court: Milan?

A. Chickasaw.

The Court: Covington?

A. Ruffin.

The Court: Also Greenfield, Martin and Union City?

A. That is right. Ruffin has six towns; Covington, Newbern, Martin, Greenfield and Hickman.

Mr. Wright:

Q. Chickasaw theatres were all acquired at the time—Chickasaw, your first interest in Chickasaw Theatres was acquired at the time you got your half interest in the Chickasaw Amusement Company?

A. No, in buying Chickasaw Amusement Company, I only got Mi- and Humboldt.

[fol. 1927] Q. What is your Chickasaw town?

A. Alamo, was the next town we added.

Q. Alamo was acquired after the Chickasaw Amusement Company was formed?

A. That is right.

Q. You didn't have any Alamo theatre up until that time?

A. Chickasaw bought Alamo in December, 1937.

Q. This tabulation that you have made refers exclusively to contracts that were made and pictures that were played after the Ruffin Amusement Company took over these operations, isn't that right?

A. Yes, sir.

Q. You have the fitures here as to what certain selected pictures——

A. You see, those are the pictures that they designated as their "4-O Top".

Q. "4-O Top" pictures.

A. Yes.

Q. You have shown here the gross that the pictures took in at your own theatre?

A. Yes.

Q. All these tabulations showing the number of days that you played them?

A. No, but our records do.

[fol. 1928] Q. You have records that show how long they played. Do your records also show the day of the week they played?

A. Day of the week and whether it was a cash-out or not.

Q. All that these records show, as I understand it, is the flat rentals that you paid on the Loew pictures actually run, from 41 per cent, or from 39 per cent to 63 per cent of the gross?

A. That is right.

Q. Of course, for the flat rental pictures, you were able to play them any day of the week that you chose?

A. That is right.

Q. Or as long as you wanted to?

A. Oh, I would say this; We had the privilege, when we bought the pictures flat rental, to play them either two or three days. Most of those larger pictures were played three days, which really helped the pictures' gross more on flat rental. Nevertheless, you can see what we paid. I didn't bring that evidence here to use it, but as it was, Scott asked me, and I knew we were paying more for product—I don't like to say anything that I couldn't back up and I more or less got that information up for myself.

Q. Now, you have complete records, haven't you, you say you have the amount that each picture grosses while it is played in the theatre?

A. Our system of running our business, we have a daily [fol. 1929] report, we have a weekly report and we have a cut-off book which shows a cut-off on each Company.

Q. You have been keeping those same records for the period both before your Ruffin Amusement Company was organized and after?

A. Frankly, we only started keeping this system after I made my connection with Mr. Stengel.

Q. Didn't you, prior to that time, keep a record of the grosses?

A. No, it was individual business. I didn't even have daily reports printed; we just used a five-cent note book.

[fol. 1930] Q. So you haven't any record which would enable you to compare the percentage of the gross receipts received from the exhibition of any particular company's pictures with the film rent after and before the period that Ruffin took over?

A. I was going to tell you there that if I had kept that kind of system I couldn't present it because on January 29, 1936, we had a fire and we lost everything. We didn't save anything then in the theatre except a popcorn machine.

Q. You haven't any records at all which would enable you to make a comparison then between the percentage of gross that you had to pay in film rentals to these companies after Ruffin took over and what you had to pay before?

A. The only way that I could get that information would be from the distributors own files themselves because all my records——

Q. Their files wouldn't show the gross of your theatre?

A. No, but if it was a percentage picture it would show what we paid them.

Q. Yes. And one of your objections to percentage pictures is that it does give the distributor a line on your gross, is that right?

A. Yes. I don't think you understood me there; that if I did have those records, I couldn't produce them because they were lost in the fir-.

Q. I understand you haven't the records, in any event.

[fol. 1931] Q. Does Mr. Stengel also hold an office with the Chickasaw Amusements?

A. Yes, sir.

Q. What is his position with that company?

A. Vice President.

Q. And he does the film buying also for Chickasaw?

A. Yes, sir.

Q. And what compensation does he receive for that?

A. $50.00 a week, but I might say this, that he is not drawing any money at the present time out of Ruffin or Chickasaw. We have dispensed with salaries.

Q. Now, when did that happen?

A. That happened January 1st.

Q. You don't mean he is no longer connectec with the company?

A. I might add this; we are not paying our officers cash money in salary. We are crediting it to their account on the books.

Q. Subject to later distribution from earnings, is that it?

A. That is it, if we have it.

Further this witness saith not.

[fol. 1932] Earl Hendren, next witness, recalled, testified as follows:

Direct examination.

By Mr. Wright:

Q. You are the same Earle Hendren that testified here?

A. Yes, sir.

Q. Since that time you have made a search of the records of the Cherokee Amusement Company to see if you could find the records to show how that organization of the Parrott-Hendren theatres was handled?

A. Yes, sir.

Q. Have you been able to find any records that show?

A. No, sir.

[fol. 1933] Mr. Armistead. If I may, Mr. Wright; last evening we asked that the book-keeper check up and see if he could find the set-up when Parrott and Hendren sold out their theatres. There was no allocation made to the respective theatres at Erwin and Lafollette, just using those two towns for illustration, there were no allocations made as to them and the various leases, and when the government came down to check the books for income tax pur-

poses, those representatives could not find any allocation at that time. I just name that statement to show that there is nothing trying to be withheld. It just is not in existence.

Mr. Wright.

Q. Mr. Hendren, you also made search for what agreements the Cherokee Amusement Company had, in which any one agreed not to compete with Cherokee?

A. Yes, sir.

Q. And I believe the only agreements you were able to locate or that have been produced is the one with reference to Newport, Tennessee, a copy of which was already introduced in evidence, and t-is is the agreement, dated November 9, 1939, with Mr. Godchaux is that correct?

A. Yes, sir.

[fol. 1934] Q. Those are the only two you could locate?

A. Well there is one there for sprucepine too.

Q. No, this is Godchauz one of the agreements that refers to Marshall, Tennessee, and that Spruce pine one I believe has also been introduced in evidence before. Other than those three you have not been able to locate any?

A. That was all there were.

Q. I will ask to have this agreement with Mr. Godchauz marked with the next Government exhibit number, and offered in evidence. Agreement with Mr. Godchauz with respect to the town of Marshall, Tennessee.

Mr. Armistead. Is that the original; that is the only original that the witness has made; you may have it copied and substitute a copy?

The Court. Yes. For how long a period of time does that cover?

Mr. Wright. That I believe is for five years and is limited to the situation at Marshall. That is all.

Cross-examination.

By Mr. Armistead.

[fol. 1935] Q. Mr. Hendren, the records of Cherokee Amusements, Inc, which you were called to search for and produce, and turn them over to Mr. Simons to be Simonized, did you not?

A. Yes, sir, I made the search.

Q. Now I will ask you if when the Crescent Amusement Company entered Greenville, Tennessee, if during the time you continued to operate your theatre there, if any of the product was taken away from you which you had at the time The Crescent Amusement Company entered?

Mr. Wright. Of course, if the Court please, I think this is a part of the defendants' case. Mr. Hendren is secretary-Treasurer of one of the defendants in the case, I assume he will be available as a witness for the defense at a latter date, for that reason I do not see any necessity for him to put long on their case, they are not at this particular point, he was called by us as an adverse witness under rule 43 (b).

Mr. Armistead. And at the time he was questioned about the film contracts he had at Greenville and Maryville, Tennessee, and cross-examination was reserved until a future day.

Mr. Wright. I assumed that was when you were going [fol. 1936] to call him as part of your case.

Mr. Armistead. He was asked to come back and bring certain papers, and I reserved cross-examination.

The Court. I recall your reserving the cross-examination, I do not recall that he was examined about these particular matters.

Mr. Wright. I did examine with reference to the business at Greenville and Maryville, prior to the time Cherokee took those towns over.

The Court. Yes, sir, then this would be competent as cross-examination.

Mr. Wright. Yes, I can see that, the only question was whether it should be done now as a part of our case, or at a later date.

The Court. Go ahead then, let's get him in while we are here.

Mr. Armistead:

Q. Do you recall what product you were using at Greenville?

A. At the time the Crescent came in there?

[fol. 1937] Q. Yes, sir?

A. We were using Vitagraph, Fox, RKO, Paramount.

Q. Now then you were questioned about if you were able to obtain Warner film product for Greenville, if it was not sold to Crescent rather than to you; did you endeavor to

get or tell a fellow named Salesman Bryan, that you were sore because you would not sell product, Warner product for Greenville, wouldn't sell Warner Product for Greenville?

A. I didn't tell him I was sore, I told him that I didn't think it was good for Greenville.

Q. Did you make a remark about that for Greenville? That you had no pr-duct for Greenville?

A. No.

Q. Why not?

A. I didn't want it, I had plenty of pictures.

Q. Why were you talking to Bryan then telling him you didn't want it?

Q. There were two reasons for that, may be more; one was to get rid of him because I knew he sold Crescent and he couldn't sell me for Greenville, and he was very persistent, wanted to sell me the other theatre, just like a book agent, I couldn't get rid of him, and I said if you can do this, I didn't want it, but I knew it was impossible for him to do it.

Q. Let's get to Maryville, Tennessee; Sudekum, or Crescent, was already there when you entered Maryville, was it not?

A. Yes, sir, I went in on Crescent.

[fol. 1938] Q. What product did you get there in Maryville?

A. Well for the time we did call on Paramount, RKO Fox, United Artists, and I believe some Universal.

Q. Well at any time, did you take Fox away from Crescent?

A. Yes, sir.

Q. Well you were there in Maryville, was it while you were there in Maryville?

A. Yes, sir.

Q. Did at any time Crescent take any product away from you?

A. They did Paramount after we had had them for a while.

Q. How many years product did you have available for use there in Maryville?

A. We had two years.

Q. Do you remember what two years that was?

A. It was 1933, 1934, *1934*, 35, and anything back of that that we wanted, they had prints of it.

Q. Did you have enough pictures there to make your show?

A. Yes, sir.

Q. Did you have enough pictures to make as many changes in your theatre as the Crescent Amusement Company was making in its theatre?

A. Yes, sir.

Q. At Maryville?

A. Yes, sir.

[fol. 1939] The Court: Were they all the pictures you had to operate in 1933-34, and 1934-35?

A. No, sir, that was not Fox.

The Court: Paramount, Fox and Universal?

A. Yes, sir, well Fox was 1934-35, we didn't have them the first year, Mr. Sudekum had them and we got them later.

Mr. Armistead: That is next year's product?

A. Yes, sir.

Q. I will ask you if you did not also before you sold out to Crescent use product for the 1936-37 product of RKO?

A. In Maryville?

Q. Yes?

A. Yes, sir.

Q. Now did you try to purchase that 1935-36 product Paramount, before Mr. Sudekum bought it out at Maryville?

A. What product?

Q. Paramount 1935-36?

A. No, they tried to sell it to me.

Q. And then sold it to Mr. Sudekum?

A. Yes, sir.

Q. Mr. Hendren, did you happen to be in Morristown [fol. 1940] when Tim Smith opened his theatre there?

A. Yes, sir.

Q. Did you talk to him?

A. Yes, sir.

Q. I will ask you if in substance he did not tell you that Crescent or Mr. Sudekum would give him fifteen thousand dollars that he would sell out his theater in Morristown and would not enter Columbia, Murfreesboro or Maryville.

Mr. Wright: This does not come under the head of cross-examination now, because I did not go into any Morristown situation with this witness.

The Court: Do you have any further cross-examinaton?

Mr. Armistead: Yes, sir.

The Court: Go ahead and answer the question.

A. Yes, sir, he told me that.

The Court: What did he tell you?

A. He told me that if Mr. Sudekum would give him, he said he had sent word to Mr. Sudekum if he would give him fifteen thousand dollars he would turn over the equip-
[fol. 1941] ment he had in the theatre which he had opened in Morristown, and that he would agree not to build a theatre in Columbia, Murfreesboro and Maryville. I might add this, I asked him if he thought Mr. Sudekum would pay out that kind of money, and he said, well it would be worth fifteen thousand dollars to Mr. Sudekum for a nuisance value.

Mr. Wright: Did you pass the proposition along to Mr. Sudekum?

A. I think he had sent it by somebody else.

Q. What did you do after he told you that?

A. It was so ridiculous I didn't know that I did anything.

Q. You didn't inform Mr. Stengel or Mr. Sudekum?

A. I don't believe I did, I may have later, I don't think I did at the time, I am sure I didn't.

Q. When youtold him that later, when was the first time?

A. Oh probably the next time I had occasion to see him, I don't know just when.

Q. Did you know what Mr. Sudekum said about it?

A. I didn't tell him until after and he just kind of laughed.

The Court: Said it would be worth it as a nuisance value?

A. Yes, sir.

[fol. 1942] The Court: Might have been at that.

A. I wouldn't say he said the word nuisance, but he said trouble, aggravation, or something like that. That was what he meant.

Mr. Wright:

Q. You said you were buying Paramount, Fox for your theatre at Maryville? 1934-35, or was that at Greenville?

A. I was buying Fox for all the towns.

Q. You had Paramount for both Greenville and Maryville for the 1933-4 and 34-5 seasons?

A. Yes.

Q. You were not in Maryville for the 1933-4 season?

A. I was using it, the 1933-4 included from the fall of 1933 to the fall of 1934.

Q. You went in in the fall of 1934 into Maryville?

A. Yes, sir.

Q. And when you bought the 1934-5 Paramount pictures, you also talk about the 1933-34 at the same time, is that right?

A. Yes, sir.

[fol. 1943] Mr. Wright:

Q. Then you say the pictures were offered to you at Maryville for the 1935-1936 season?

A. Yes sir.

Q. Who made the offer to you?

A. L. C. Law.

Q. Who is he, a Paramount salesman?

A. Yes.

Q. Where did you have this conversation with th-m?

A. He talked to me several times; once in Knoxville, once in Maryville and two or three times in Greenville.

Q. When was the first time?

A. I couldn't recall that but that was the topic of conversation and negotiation for, oh, four of five months.

Q. When did it start?

A. I couldn't say just when it started; probably six months before they sold Mr. Sudekum.

Q. When did they sell Mr. Sudekum?

A. The first I heard about it was in the Spring of 1936.

Q. You are referring now to the 1935-1936 season product?

A. Yes sir.

Q. How did you hear about it?

A. I believe a Columbia salesman told me.

Q. Well, did you notice when the pictures started to play in Sudekum's opposition theatre there?

[fol. 1944] A. They didn't start to play until after they sold out Sudekum; that was the 1936-1937, he bought, I believe that is right.

Q. 1936-1937?

A. I believe it was 1936-1937.

Q. What happened with the 1935-1936?

A. I believe we had that. I believe what we bought was 1934-1935 and 1935-1936. As I recall it, Sudekum didn't play any Paramount pictures while we were in Greenville or Maryville.

Q. You had 1934-1935 and 1935-1936, before he came in there?

A. I think that is the way it was—Not before he came in there; he was already in there. We went in there on him.

Q. Now, this product, you say, this Fox product you say you took away from Crescent; where was that, Maryville?

A. Yes.

Q. What season was that?

A. That was 1935-1936.

Q. That was for what theatre?

A. That was for the Park, in Maryville.

Q. That was the theatre that had been previously leased by Sudekum?

A. That was the theatre we were operating.

Q. Yes, but before you operated it?

A. Sudekum operated it before we did, yes.

[fol. 1945] Q. When did he drop it?

A. We got the lease, his lease expired and we got it before it expired, or something of that kind.

Q. When was that?

A. We got the lease, I believe it was along in August, 1934; it was signed, maybe, in the middle of the summer, I am not sure.

Q. He had showed the Fox pictures in 1933-1934 season?

A. Yes.

Q. You played them at the same theatre for 1934-1935 season?

A. We played them in the 1935-1936 season.

Q. What did they play for the 1934-1935 season?

A. Who, Sudekum?

Q. Now, where did Fox 1934-1935 product play in Maryville?

A. They played in the Crescent house, I presume. I am sure they did because we bought them second run.

Q. What was the name of the Crescent house?

A. The Capitol.

Q. When was it the Crescent began operating the Capitol there?

A. It was in 1935.

Q. That was after you had taken over the Park?

A. Yes sir.

Q. Do you remember when, in 1935, that was?

[fol. 1946] A. No. I believe it was in May.

Q. May, 1935?

A. I am not sure, I believe that was the date, the month.

Q. When did they play this 1934-1935 Fox product?

A. Well, they played it in 1934 and 1935.

Q. Well, they didn't operate there until May, 1935, according to what you have just said?

A. Oh yes, they had the Palace theatre there.

Q. When did they acquire the Palace?

A. They acquired it when they found that we had taken their lease.

Q. When was that?

A. I don't know the date—you mean, when we took the lease?

Q. Yes?

A. We took the lease in 1934.

Q. Then they opened the Palace there in 1934?

A. Yes sir.

Q. And they played the 1934-1935 Fox product at the Palace?

A. I don't know where they played it.

Q. Do you know that they played it at all?

A. Yes.

Q. You don't know where it was played?

A. Yes I do. I do know some pictures they played at the Palace and they probably played some in the Capitol after the Capitol was opened.

[fol. 1947] Q. That was during the 1934-1935 season?

A. Yes sir.

Q. When was it you bought Fox for the Park?

A. We bought Fox for 1935-1936.

Q. The 1935-1936 season. When was it that you made the contract, do you recall?

A. No sir, I don't remember the date.

Q. Do you remember what time of year it was?

A. No, I don't remember that.

Q. Do you remember what year it was?

A. Well, it was a year before we made the deal with Mr. Sudekum.

Q. Do you remember who made the offer to you?

A. I believe Mr. Wilson, Paul Wilson and Mr. Fairchild.

Q. As a matter of fact, it was not offered to you until very late in the season, isn't that right?

A. I don't recall.

Q. Probably in the Fall, late Fall of 1935?

A. That is about when you buy pictures anyway, in the Fall.

Q. You don't recall whether the Fox pictures were offered to you in October, November or December?

A. I couldn't say about that.

Q. It might have been that late, might it not?

A. I beg pardon?

Q. It might have been as late as December, might it not?

A. It might have been.

[fol. 1948] Q. Or even January, 1936?

A. I don't believe it was that late. As I recall, we played Shirley Temple on Christmas day.

Q. You knew, didn't you, that Crescent had previously declined to buy Fox pictures for that season, isn't that a fact?

A. They didn't tell me that.

Q. The salesman didn't tell you that?

A. No sir.

Q. Don't you know that was at the time when Fox was selling away from Crescent, generally?

A. He sold us away from Crescent.

Q. Didn't they tell you they were trying to sell other independents at that particular time?

A. I don't know that they were.

Q. You say in Greenville the only product you lost to Crescent was Warner Vitagraph?

A. We didn't lose that, we just refused to buy it.

Q. You refused to buy it after they had already sold it, as I understood your testimony?

A. No, I refused to buy it, I don't think they had sold it when I refused to buy it.

Q. You previously testified one of the reasons you didn't buy it, was because they had already sold it?

A. That was later, I refused to buy for Lenoir City and Sweetwater and other towns because they had sold to Crescent.

[fol. 1949] Q. They sold to Crescent before they gave you the opportunity to buy, isn't that right?

A. No, the salesman tried to sell me long before Crescent opened their house.

Q. Who was that salesman?

A. Randal Bryan.

Q. When did he try to sell it to you?

A. He tried to sell it, oh, in the spring after it was announced, that Crescent was coming in there. He tried to sell it several times.

Q. When was the first time?

A. I couldn't be positive about that?

Q. You didn't buy it because you had so many pictures you didn't know what to do with them, isn't that right?

A. Yes.

Q. Crescent was coming in there in opposition and you needed more pictures than you could get?

A. That was one reason I didn't buy it. I couldn't get along with their salesman. He had a lot of ideas that didn't fit into our set-up.

Q. After Crescent came in, you still had all the pictures that you needed?

A. Yes sir.

Q. You could buy just as good pictures as the Crescent played?

[fol. 1950] A. Played better.

Q. Made more money than you ever did before?

A. No sir.

Q. Why didn't you make more money.

A. I never did make much money.

Q. Well, you made just as much while they were competing, isn't that right?

A. Well, some weeks we made more, some weeks we made less.

Q. How about the whole time they were in there, as compared with the time before they were in there?

A. Well, I guess we made less.

Q. When, during which period?

A. Probably right after the first came there.

Q. I believe you said you made a search for the correspondence or any memoranda that you had of your dealings with the distributors while you were with Parrott & Hendren?

A. Yes sir.

Q. And you didn't find anything, is that right?

A. No sir, we did not.

Further this deponent said not.

* * * * * * *

[fol. 1951] Mr. Wright: If the Court please, we have a letter here that should have been offered before and I would like to offer it at this time. It relates to the testimony of Mr. Hendren. You may recall he testified to having bought the Fox 1935-1936 product for Maryville, and this letter is a letter from Mr. Hendren and Mr. Parrott to the Fox Film Corporation, dated February 7, 1936, which was produced by Fox and I would like to offer it at this time. It relates to that transaction of the purchase of the Fox 1935-1936 product by Mr. Hendren for Maryville.

The Court: I don't recall his particular testimony about that.

Mr. Wright: I asked him whether he—He at first testified, when Mr. Armistead examined him, that he had taken away this 1935-1936 product from the Crescent. Then I asked him, if you remember, when he bought it, if it wasn't a fact that he had bought it late in the year after it had been rejected by Crescent, and then he said he didn't have any [fol. 1952] such statement as that to be the fact. This letter, I think, shows that was the fact.

The Court: All right.

Mr. Wright: The letter, as I say, is dated February 7, 1936, and is addressed to Mr. Fairchild, Fox Film Corporation, Atlanta, Georgia, and is as follows:

"Dear Fairchild:

I went over to LaFollette this week and had a long conference with Mr. Parrott, and he asked me to inform you and Mr. Wilson that we could not submit a proposition for our holdings at this time.

We have been discussing a proposition with other interest parties, and Mr. Parrott feels obligated to those parties, and does not feel like it is the thing to do until something has been definitely decided as to a possible disposal of our competitive situations to parties now interested and with whom we have been negotiating.

If your office intends to approve or reject a deal from Mr. Sudekum, I can assure you that it will be to your [fols. 1953-1961] advantage to quit stalling and make some immediate disposition of the situation, or it might be too late for us to be of any benefit to you in the event your service became available for Maryville.

I might add, that should you take immediate action and advise us of the avilability of your pictures for Maryville and an additional year in Greeneville, the present negotiations might be discontinued.

Let me also suggest that you either close with Crescent or be in a position to sell us immediately as I can only assure you that immediate action is necessary.

Yours very truly, —— ——."

This will be the next number.

The Clerk: Exhibit No. 258.

The plaintiff here rested its case in chief.

[fols. 1962-2244] [Stamp:] Filed Gov't. Exhibit No. P-23 J. D. Henry, Testimony, July 16, 1941, L. B. Ormes, Clerk. By S. E. Dann, chief D. C.

April 19, 1939.

Paramount Film Distributing Corporation, 1501 Broadway, New York, N. Y.

GENTLEMEN:

Re: Union City, Tennessee.

Referring to our agreement dated July 28, 1938 as of November 1, 1937, and all riders thereto, it is understood and agreed that the license therein granted with respect to Union City, Tennessee, shall be and the same hereby is amended and modified so that the remaining unexhibited flat rental feature photoplays, short subject photoplays and Paramount Sound News shall be exhibited in either the Capitol, Opera House or Ritz Theatres in Union City, Tennessee instead of in either said Capitol or Opera House Theatres. It is expressly understood and agreed however, that the feature photoplays licensed upon percentage basis shall be exhibited in only said Capitol Theatre.

Except as herein expressly provided, the aforementioned agreement and all riders thereto shall be and remain in full force and effect.

Kindly signify your agreement hereto by signing underneath the words "Agreed to" at the bottom this letter.

Very truly yours, Crescent Amusement Company.
By Tony Sudekum.

Agreed to:
Paramount Film Distributing Corporation.
By O. Morgan.

* * * * * * * * *

[fol. 2245] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DIRECTING EXHIBITS TO BE SENT UP IN ORIGINAL FORM —January 11, 1944

By consent of the parties, and for good cause shown, it is ordered that the following exhibits designated in the Amended Praecipe of Appellants, The Crescent Amusement Company et al, be sent up with the record in their original form, towit:

Plaintiff's Exhibits: P 16; P 24; P 29; P 30; F. 8; F 12.
Defendant's Exhibits: 220; 221; 222; 227; 228; F 15.

The Clerk will include a copy of this order in the transcript of the record.

Approved for entry:

George H. Armistead, Jr. (S.), William Waller (S.), Attorneys for Appellants, The Crescent Amusement Company, et al. Horace Frierson, U. S. Atty.

Enter: Jan. 11, 1944. Elmer D. Davies (S.), Judge.

[fols. 2246-2254] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted]

MOTION OF THE DEFENDANT EXHIBITORS, THE CRESCENT AMUSEMENT COMPANY, ET AL., TO STRIKE PORTIONS OF PLAINTIFF'S EVIDENCE AND EXHIBITS—Filed August 5, 1941

Come the defendants, The Crescent Amusement Company, et al., referred to as defendant exhibitors, and having, for convenience, joined in the making of this motion, and now move the Court to strike the following portions of plaintiff's proof and exhibits:

(For convenience, defendant exhibitors will be referred to by abbreviations such as Crescent, Cumberland, etc., rather than by their full corporate names, and similar abbreviations will be used for the distributors.)

* * * * * * *

[fol. 2255] 24. All inter-office or inter-company memoranda and correspondence of Universal. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Universal, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were [fol. 2256] written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

25. All inter-office or inter-company memoranda and correspondence of United Artists. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and United Artists, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written

them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

26. All inter-office or inter-company memoranda and correspondence of Columbia. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Columbia, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

27. All inter-office or inter-company memoranda and cor-[fol. 2257] respondence of RKO. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and RKO, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

28. All inter-office or inter-company memoranda and correspondence of Fox. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Fox, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their duties, and these facts are not relevant or material to any issue in the case.

29. All inter-office or inter-company memoranda and correspondence of Paramount. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Paramount, and no such case has been proven. In any event, said exhibits are no proof [fol. 2258] of the truth of their contents, because the only evidence relating to them is that the letters and memoranda

were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

30. All inter-office or inter-company memoranda and correspondence of Warner Brothers. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Warner Brothers, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

31. All inter-office or inter-company memoranda and correspondence of Loew's. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Loew's, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not [fol. 2259] relevant or material to any issue in the case.

William Waller, Geo. H. Armistead, Jr., Attorneys for Defendant Exhibitors.

Armistead, Waller, Davis & Lansden, Of Counsel.

[fol. 2260] IN UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted]

SUPPLEMENTAL MOTION OF THE DEFENDANT EXHIBITORS, THE CRESCENT AMUSEMENT COMPANY, ET AL., TO STRIKE PORTIONS OF PLAINTIFF'S EVIDENCE—Filed August 7, 1941

Come the defendants, The Crescent Amusement Company, et al., referred to as defendant exhibitors, and having, for convenience, joined in the making of this motion, now move the Court to strike the following portions of plaintiff's proof:

(For convenience, defendant exhibitors will be referred to by abbreviations, such as Crescent, rather than by their full corporate names, and similar abbreviations will be used for the distributors.)

1. That portion of the testimony of the witness, Rubel D. Page, in which he, in substance, testified that Mr. McClure, a representative of Fox, told him that the Fox pictures for the season 1938-1939 had been sold in Mt. Pleasant, Tennessee, to Crescent.

This evidence should be stricken because at the time it was provisionally admitted counsel for plaintiff stated that [fol. 2261] they intended to introduce proof that Crescent and Fox had conspired together to prevent so-called independent exhibitors from obtaining pictures not only in Mt. Pleasant, Tennessee, but in other towns. Plaintiff has now rested its case and there has been no evidence introduced to show a conspiracy between Crescent, or any of the defendant exhibitors, and Fox to monopolize or restrain interstate commerce in motion picture films. It is hearsay.

2. That portion of the testimony of the witness, W. O. Taylor, in which he, in substance, testified that Watson, a representative of Paramount, in the Spring of 1938 told him that he was very sorry to inform him that Paramount had made a franchise with the circuit (Crescent) and had given the circuit in the towns of Martin and Greenfield clearance over Dresden.

This evidence should be stricken because at the time it was provisionally admitted counsel for plaintiff stated that they intended to introduce proof that Crescent and Paramount had conspired together to prevent so-called independent exhibitors from obtaining pictures not only in Dresden, Tennessee, but in other towns. Plaintiff has now rested its case and there has been no evidence introduced to show a conspiracy between Crescent, or any of the defendant exhibitors, and Paramount to monopolize or restrain interstate commerce in motion picture films. It is hearsay.

3. That portion of the testimony of the witness, Robert L. Curry, in which he, in substance, testified that Butler, a representative of Loew's, had informed him that Loew's was negotiating with Crescent for a five-year franchise for its films, and that Loew's accordingly could not sell the Dixie Theatre in East Gadsden, Alabama, its 1939-1940 product.

[fol. 2262] This evidence should be stricken because at the time it was provisionally admitted counsel for plaintiff stated that they intended to introduce proof that Crescent and Loew's had conspired together to prevent so-called independent exhibitors from obtaining pictures not only in East Gadsden, Alabama, but in other towns. Plaintiff has now rested its case and there has been no evidence introduced to show a conspiracy between Crescent, or any of the defendant exhibitors, and Loew's to monopolize or restrain interstate commerce in motion picture films. It is hearsay.

4. That portion of the testimony of the witness, H. T. Bailey, in which he, in substance, testified that Butler, a representative of Loew's, told him in December, 1940, that Loew's was ready to make a contract with the Dixie Theatre, East Gadsden, Alabama, for its 1940-1941 product.

This evidence should be stricken because at the time it was provisionally admitted counsel for plaintiff stated that they intended to introduce proof that Crescent and Loew's had conspired together to prevent so-called independent exhibitors from obtaining pictures not only in East Gadsden, Alabama, but in other towns. Plaintiff has now rested its case and there has been no evidence introduced to show a conspiracy between Crescent, or any of the defendant exhibitors, and Loew's to monopolize or restrain interstate commerce in motion picture films. It is hearsay.

5. That portion of the testimony of the witness, Tim Smith, in which he, in substance, testified that Randal Bryant, a representative of Warner, informed him before he opened his theatre in Newport, Tennessee, that he, Smith, could buy first-run product of Warner for Newport.

[fol. 2263] This evidence should be stricken because at the time it was provisionally admitted counsel for plaintiff stated that they intended to introduce proof that Crescent and Warner had conspired together to prevent so-called independent exhibitors from obtaining pictures not only in Newport, Tennessee, but in other towns. Plaintiff has now rested its case and there has been no evidence introduced to show a conspiracy between Crescent, or any of the defendant exhibitors, and Warner to monopolize or restrain interstate commerce in motion picture films. It is hearsay.

6. That portion of the testimony of the witness, W. F. Roth, in which he, in substance, testified that Lowe, a repre-

sentative of Paramount, told him in the Summer of 1937 that Paramount would not sell a franchise to anybody.

This evidence should be stricken because at the time it was provisionally admitted counsel for plaintiff stated that they intended to introduce proof that Crescent and Paramount had conspired together to prevent so-called independent exhibitors from obtaining pictures not only in Gallatin, Tennessee, but in other towns. Plaintiff has now rested its case and there has been no evidence introduced to show a conspiracy between Crescent, or any of the defendant exhibitors, and Paramount to monopolize or restrain interstate commerce in motion picture films. It is hearsay.

William Waller, Geo. H. Armistead, Jr., Attorneys for Defendant Exhibitors. Armistead, Waller, Davis & Lansden, Of Counsel.

[fol. 2264] IN THE UNITED STATES DISTRICT COURT

AMENDMENT TO MOTION OF DEFENDANT EXHIBITORS, THE CRESCENT AMUSEMENT COMPANY, ET AL., TO STRIKE PORTIONS OF PLAINTIFF'S EVIDENCE AND EXHIBITS—Filed August 8, 1941

Come the defendants, The Crescent Amusement Company, et al., referred to as defendant exhibitors, and having, for convenience, joined in the making of a motion heretofore filed to strike portions of plaintiff's evidence and exhibits, now amend said motion by moving the Court to strike the following additional portion of plaintiff's proof and exhibits:

1. The testimony of W. O. Taylor, and exhibits thereto, and all exhibits relating to the town of Dresden, Tennessee, because the said testimony and exhibits are not relevant or material to any issue in this cause, but are wholly outside the issues made by the pleadings in that the towns of Martin and Greenville, Tennessee, referred to as being towns adjoining Dresden, Tennessee, where Mr. Taylor's theatre is located, are not so-called "Crescent towns" but are towns in which Ruffin Amusement Company, Inc. (which [fol. 2265] is not a defendant in this case) operates theatres.

Geo. H. Armistead, Jr., William Waller, Attorneys for Defendant Exhibitors. Of Counsel: Armistead, Waller, Davis & Lansden.

[fol. 2266] IN UNITED STATES DISTRICT COURT

PORTIONS OF TRANSCRIPT RELATING TO MOTION TO STRIKE AND THE ACTION OF THE COURT THEREON

Mr. Raftery: May it please the Court, under Rule 7, which permits the making of an oral motion during the trial, I now move, under Rule 41-b to dismiss this action; that upon the facts and the law the plantiff has shown no right to relief as to the defendants Universal Pictures Company, Inc. That is the company that Mr. Wright, in reading into the record, described as being a producer and not engaged in distribution; and no evidence has been offered against Universal Pictures Company, Inc., except the suggestion that it owns control of the stock of the [fol. 2267] defendant Universal Film Exchanges, Inc., which is the distributor referred to in Paragraph 24, page 7, of the printed complaint.

The Court: Now, I find Universal Film Exchanges, but I don't find the other defendant.

Mr. Raftery: The Universal Pictures Company, Inc., is named at 23, page 6, of the printed complaint.

The Court: Yes; I have it.

Mr. Wright: If the Court please, I don't see that it makes any difference whether Universal Pictures, Inc., were dismissed or not. I don't see why it is of any importance here one way or the other.

The Court: All right; let the motion be granted.

Mr. Raftery: I now move, under the same rules, to dismiss the action; that upon the facts and the law the plaintiff has shown no right to relief as against the defendant Universal Film Exchanges, Inc. Now, from the beginning of the case——

[fol. 2268] The Court: Mr. Raftery, if it would suit you just as well, before entering into the argument of the motions, suppose that we let your motions be made and then any other defendants that wish to make motions, make them, and let's have all the motions first. There may be some that I may want more argument from than others.

Mr. Raftery: All right, sir. I now move, under the same rules, to dismiss the action; That upon the facts and the law the plaintiff has shown no rights of relief as against the defendant United Artists Corporation, referred to in Paragraph 25, described in Paragraph 25 of the complaint.

The Court: All right. Any other motions?

[fol. 2269] The Court: Any other motions?

Mr. Frolich: I move under the same rule as Mr. Raftery moved under, to-wit Rule 41, that the court dismiss this complaint against the defendant Columbia Picture Corporation, on the ground that on the facts and the law, the plaintiff has shown no right to relief, and there has been no proof of any kind under the allegations of the complaint with respect to said defendant.

Mr. Mitchell: May it please the Court, under the same rule and because the plaintiff under the facts developed in the evidence, and under the law of this case, has made no case; I move the dismissal of this action against Louis Rosenbaum, and for the same reasons and under the same rule, I move that this action be dismissed against defendant Nettie Sudekum, and for the same reasons I make the same motion for the dismissal of this action against the partnership known as Muscle Shoals Theatres, composed of Louis Rosenbaum and Nettie Sudekum.

The Court: All right, sir.

[fol. 2270] Mr. Armistead: May it please the Court, I have here motions on behalf of the Cumberland Amusement Company, The Crescent Amusement Company, the Lyric Amusement Company, they are combined in one motion, the Rockwood Amusement Company, the Lyric and Kentucky; and another for the Strand Enterprises, and another by Nu Strand, and the individual defendants.

I will just read one of the motions.

The Court: They are the same?

Mr. Armistead: Yes, sir.

The Government, or the plaintiff, having completed the presentation of its proof, Cumberland Amusement Company moves the court for a dismissal of this case as to it, and I will file the motions after I have read them.

(Reads Motions to dismiss and motions to strike evidence.)

* * * * * * *

The Court: As to the personal defendants, those are Messrs. Sudekum, Stengel and Baulch.

[fols. 2271-2272] Mr. Armistead: Yes, sir. And I have another motion to strike, made by the defendant exhibitors, to strike portions of the evidence. (Reads.)

The Court: You would want that motion acted upon before I acted on your other motion?

Mr. Armistead: Yes, sir, I should have made this motion to strike first. And the same motion as to the United Artists, Columbia, RKO, Fox, Paramount, Warner Bros. Loews, or all eight distributors.

. . . . . .

[fol. 2273] The Court: Gentlemen, I have considered these motions just as thoroughly as I could. The motion of Universal Film Exchange has caused me the most concern. There is evidence in the record of an isolated transaction pertaining to the negotiations between Mr. Henry and Universal Film Exchange, through its branch manager at Memphis. I have gone over this evidence thoroughly, read it two or three times. I can not escape the conclusion that the evidence establishes on its face prima facie, that the Universal Film Exchange had taken an application from Mr. Henry for the 1938-1939 season's product, with a rider for the next two years, and that this application was approved, forwarded to the Memphis Branch, Mr. Henry was notified by the Branch Manager by telephone that the application had been approved, and he would come in within the next few days and deliver them, but Mr. Henry told him he would be in Memphis next Tuesday I believe it was, and it would not be necessary for him to do that, he could deliver them, but he would call for them and he did call by for it and the manager was not there. The secretary told him that the contract [fol. 2274] was in the office and had been approved, but she could not deliver it, and did not deliver it in the manager's absence. About a week later he saw the manager, or later on he saw the manager and the manager told him that it had been held up pending negotiations with the Crescent Company. Then after making several trips to the Memphis branch, not getting any satisfaction about his contract, Mr. Henry called up Mr. Graham, the manager of the company, district manager at Atlanta, about his contract and wanted to know what was holding it up. Mr. Graham advised him that he had never heard of it, and necessarily it would have to come across his desk. The conclusion the court draws from that is that here was a case of an independent actually had a contract

that had been approved by the distributor, but for some reason or other that the Court thinks requires an explanation, that contract was never delivered; instead, finally a contract was given him, that is prima facie evidence on its face that the Court feels under the circumstances, that even though there is evidence in the record and other independents that had Universal's product, that is one of the specific charges made by the Government in this [fol. 2275] case, and the Court can not say that there is no evidence in the record that would tend to establish a conspiracy. Furthermore, the Court has no reason, particularly at this time, for reflecting upon the credit of Mr. Henry in that respect, or particularly in respect to this transaction. Aside from any reason that the Court would have for thinking Mr. Henry was tealling a fairy tale about the whole transaction, the Court feels that the evidence does constitute prima facie sufficient evidence; for that reason the motion of the Universal Film Exchange will be denied.

Now as to the Motion of Columbia. There are two isolated transactions in this case and, as in the case of the Universal, probable more so, there is evidence of numerous deals that Columbia has made with the independents, particularly with reference to competition of the Crescent Circuit, and other matters, two instances relied upon by the Government, are the instance of the salesman which he made on an application for a contract, submitted relative to the season's product for the town of Earlington, Kentucky, which contained the stipulation, that in the event that Madisonville, a nearby town, was sold the Columbia product, that Earlington would have the right to cancel the contract, and that this clause had been sug- [fol. 2276] gested at the instance of Mr. Sudekum, while the evidence clearly shows that the previous year's contract had carried the same clause, no evidence that the clause in that year's contract had been suggested by Mr. Sudekum. I have indicated my idea of it as to just what I thought about that situation. I think probably it is an overzealous or over-ambitious salesman, trying to sell both independent and Crescent at the same time. And, nevertheless, regardless of that situation, and regardless of Columbia's willingness to do what Mr. Sudekum might want them to do, nevertheless, nothing was done,

Earlington got their contract for that year, not only for that year, but for the next three or four years, and the last two years, the contract had an additional clause that Earlington would have fifteen days clearance over Madisonville.

Now the other instance is the testimony of Tim Smith, that when he attempted to buy Columbia's product, that Mr. Anderson told him he had three years' product open, but he would have to see Mr. Sudekum before he would sell it to him.

[fol. 2277] The Government has the theory that, in view of that statement made by Mr. Smith, that is is reasonable to presume that Anderson did make that statement and also that the statement made by the salesman relative to Hopkinsville and Bowling Green, in connection with Earlington contract, be considered as true.

Well, I would be much more impressed with the Government's theory in that matter if this testimony had been given by any other witness than Mr. Smith. I was not impressed with Mr. Smith's testimony, I was not impressed with his credibility as a witness. He was, apparently, anxious to say anything in this suit the Government wanted him to say. On cross-examination, he was evasive, indifferent and almost unwilling to answer any questions that Counsel for Defendants asked him. I was not impressed with his appearance as a witness and his lack of interest in this cause.

I shall have to find in the finding of facts in this case, that Anderson did not make any such statement to Mr. Smith; I don't believe what Mr. Smith said about it. Eventually, if I should have to do that, there is no reason why I shouldn't do it at this time. And, in view of the Court's construction, based upon these two isolated transactions, [fol. 2278] which really didn't amount to anything particularly to the course of conduct that has been proven on the part of Columbia relative to its dealings with the independents, the motion of Columbia must be granted.

The motion of Strand Enterprises has also given me some concern. As I view the evidence that is introduced, the only evidence that has been introduced is that, in some cases, the Strand has bought out their competition. But it is not proven that in buying out competing theatres, Strand Enterprises has been guilty of any of the acts complained of in the bill of complaint. In fact, the evidence

shows that it has not been guilty of any such acts with respect to clearance and with respect to restrictions imposed upon sellers of theatres, that they would not enter into the business again. There is no evidence that Strand used any unfair methods in anyway in disposing of any of their competition. As the Court views it, as long as no methods are used by any person which would be a violation of the Sherman Act which could be construed as unfair competition, under the terms and provisions of the Sherman Act, the mere matter of elimination of competition, without any other objections or without any other transactions that [fol. 2279] could be in anyway interpreted as being violations of the Sherman Act, is certainly not within the purview of the statute; and I have no reason to doubt his statement in any way when he states he had made all of the contracts for the film rentals of the Strand Enterprises and that Mr. Sudekum has never assisted him or advised him in anyway. Furthermore, the Strand Enterprises is not a party to any of these franchises; and not only that, the evidence shows that he has done business with several of the distributors at times when the Crescent was not doing business with them. I think the evidence shows his transactions have been disconnected with Crescent's.

[fol. 2280] Motions of the other defendants will be denied, and in addition the motions of the Kentucky Amusement Company and the Lyric Amusement Company, and the Court wishes to state that the principal ground upon which those motions are denied is the fact that they were included in several of those franchises.

The motions to strike certain evidence filed in the case by the defendants, as amended, will be denied.

All right.

Mr. Armistead: May it please the Court, this Columbia inter-office correspondence goes out of the record, does it not?

The Court: Well, I assume on a finding of fact that it would go out of the record. I hold that it is not sufficient to constitute a conspiracy.

Mr. Armistead: Now, may I ask, did your Honor consider the motion made by Mr. Baulch or did you overlook that?

The Court: Yes. There is probably less evidence with respect to Mr. Baulch's dealings than there is about any of the other defendants, but there are several transactions, particularly with reference to the theatres at Hopkinsville,

I believe, and some other transactions—some of the East [fol. 2281] Tennessee theatres. That is evidence. Now, I am not saying how I shall pass on that later on in the finding of facts but for the purposes of this motion, I hold that is evidence.

Mr. Raftery: If your Honor please, in the interest of aiding the preparation of the defense it will be helpful to state the grounds on which the United Artists motion was denied the same as you did on Universal, so that——

The Court: I just hold that there was more evidence as to United Artists than there was to Universal. There are many more different transactions and the seventy-three film deal proposition——

Mr. Raftery: The only other places, I think, where United Artists was mentioned was Buchanan and Miller.

The Court: Well, there is some correspondence,—I can't keep it in my mind right now—relative to the Henry matter too, as I recall it.

Mr. Raftery: The correspondence in the Henry matter shows that we sold him and he played, that is, we sold Henry complete, we sold Tim Smith complete, we sold Roth com- [fol. 2282] plete; we sold everybody complete with the exception of Buchanan and Miller.

The Court: Possibly it was Buchanan instead of Henry.

Mr. Waller: As your Honor knows, the defendant exhibitors made a number of general objections throughout the record to evidence and then at the conclusion of the plaintiff's evidence we made motions to strike. Now, where we omitted specifically in the motions to strike any evidence which was previously objected to, we want the record to show that we were not waiving those objections but continuing to rely upon them.

The Court: All right.

Mr. Waller: And I want to call your Honor's attention to the fact that we objected to the first one of those so-called non-competitive agreements that was put in the record, and if the record doesn't clearly show that that objection was to be considered as applying to all those others, we would like to have it appear in the record at this time also, and at this time renew our motion to—not to renew our motion, but to make a motion to strike all those non-competitive agreements on the ground that they are outside the scope of the issues in this case. There are no allegations

[fol. 2283] about them, as we called your Honor's attention to earlier in the proceedings.

Mr. Mitchell: It would be quite helpful to Muscle Shoals Theatres in connection with the action on this motion to indicate as you did in some of——

The Court: Well, I can't review all the evidence in this case. I just am of the opinion that there is evidence in the case against your client.

Mr. Mitchell: Well, your Honor spoke of franchises.

The Court: The reason I reviewed particularly the evidence of the Universal Company is that up until about thirty minutes ago I had practically been of the opinion that I would grant their motion; otherwise, I would have just dismissed all the motions, or granted or denied them without making any explanation.

* * * * * * *

[fol. 2284] In United States District Court

Portions of defendants' evidence

August 18, 1940

Court met pursuant to adjournment.

The Court: Have counsel for the defendants planned as to how they will present their proof?

Mr. Armistead: Yes, sir, it was to put Mr. Sudekum on first.

The Court: That will mean the Crescent Amusement Company will put on its proof first.

Mr. Armistead: Yes, sir.

The Court: You may proceed.

Anthony (Tony) Sudekum, called for defendants, being sworn previously, testified as follows.

Direct examination.

By Mr. Armistead:

Q. This is Mr. Anthony Sudekum, is it not?

A. Yes, sir.

Q. Mr. Sudekum, how old are you?

A. Be sixty-three Thursday.

[fol. 2285] Q. Where were you born?

A. Here in Nashville, out on Humphreys street and the railroad.

Q. What business did you first engage in?

A. Baking business, ice cream business.

Q. What is your present occupation?

A. Theatre business.

Q. President of the Crescent Amusement Company, are you not?

A. Yes, sir.

Q. Do you belong to any civic organizations?

A. I belong to the Chamber of Commerce, Rotary Club, Masons.

Q. I believe you recently had a degree conferred upon you by Cumberland University, did you not?

A. Yes, sir.

Q. Are you also chairman of the Nashville Housing Authorities?

A. Yes, sir.

Q. Mr. Sudekum, when did you first start out in the moving picture business?

A. About 1907.

Q. What caused you to become interested in and become engaged in that business?

A. Well it looked like the only thing I could get in for a little money and started that; all my life, I wanted to get [fol. 2286] hold of a circus.

Q. Wanted to do what?

A. Wanted to get hold of a circus, and couldn't do that, and then pictures came along, and I went in that.

Q. What year was that you first started out in the moving picture business?

A. About 1907.

Q. How much did you invest in pictures?

A. Well I had about seven hundred dollars, two parties had seven hundred dollars, that is my father and Mr. Williams, a very good friend of mine.

Q. Where did you have your first show, where was it located?

A. On Fifth Avenue between—right near the Arcade.

Q. What kind of a show was it, did they have these slides, were they reels or what?

A. Well we had reels and illustrated songs, slides, it was a very good house for that day. Had several steps to go up,

seat about a hundred and fifty or a hundred and eighty people.

Q. Was there any other theatre, moving picture theatre in Nashville, at that time?

A. Well there had been about three or four with folding chairs, but later on they closed up but one opened below the Arcade called the Chrystal, and he was doing fairly well with that and I opened up this Dixie just a few weeks afterwards,

Q. What did you do down there, did you devote all your [fol. 2287] time, your entire time to it?

A. Not at the start, wasn't so much business, I did everything, made signs——

Q. Did what?

A. Paint signs, sell tickets, catch tickets, operate, most anything, had a piano player, had Miss Druat to play the piano, Sinnett to do the singing.

The Court: You say you had illustrated songs?

A. Yes, sir, we had illustrated songs.

The Court: I believe one of the most famous was ALWAYS IN THE WAY.

A. Yes, sir, it was, and we had one AT THE END OF THE LINE, I will never forget that one.

Mr. Armistead:

Q. Did you operate the machines in that house?

A. Yes, sir, when we first started, relieved the operators.

Q. How long did you operate that Dixie Theatre?

A. Well I don't know how long we operated it, we operated it for some little time, and then there was a theatre across the street, he wanted to sell out and I wanted to buy it, he was getting more films from the General Film Company at that time than we were getting more film than we could use, right at that time, and they wanted to sell out [fol. 2288] and I persuaded my mother to let me buy it.

Q. How old were you then?

A. Oh I was, well, I don't know about twenty-two or three, I guess, may be a little older.

Q. You said something about films from whom, that you purchased your films, from whom did you purchase your films?

A. They were purchased, we first made arrangements with a St. Louis concern after I got my lease and got started on the building, O. T. Crawford I think ran a little exchange and he got film from him and may be I would get everything that had been run or a film that he had run or had been run two or three days or may be the day before, and this man said he would take care of it all right, so when I got ready to open I realised the situation, I wired him and I got a wire back and he said he was sorry he couldn't take care of me, and I didn't know much about the business, so I had to scramble around and get pictures somewheres, and the first few days I would get pictures that had been run by the other man just a day or two before, I didn't think that would do, so, and I couldn't do any better, and I had to run some pictures straight, and that was very good for those days, so I got to dealing with the General Film Company, who supplied me my films at that time.

Q. Did they have exchanges in those days?

A. Yes, sir, I think there were some, but mostly owned by [fol. 2289] private people.

Q. Did you have any opposition in Nashville?

A. Theatre opposition?

Q. Yes?

A. Yes, this Crystal and then there were several houses opened up on Fifth avenue, about seven or eight of them opened up, in that one block.

Q. Who got the films first, you or the opposition?

A. Sometimes I would get them out of Memphis, may be, and he would get them maybe a couple of days before, something like that, for the Crystal theatre, then he would make arrangements, and then I might make arrangements to get them out of Birmingham a day or two before, and I would try to get them somewhere else, and we were both getting them on release date and sometimes may be one and then the other, but there was a little difference, and there were different ones at that time.

[fol. 2290] Q. Well now, when was the Crescent Amusement Company incorporated?

A. Well, I don't know the year. We bought this Crescent Theatre out and it had a lease on it that couldn't be transferred, so we bought the stock and put the Dixie Theatre in there and called it the Crescent Amusement Company.

Q. Sir?

A. That was called the Crescent Amusement Company.

Q. Since that beginning of the Crescent Amusement Company have you and your family, members of your family, been the principal stockholders in the Crescent Amusement Company?

A. No*t*, not all the time.

Q. Have you, personally, been one of the principal stockholders of the Crescent Amusement Company all along?

A. Yes sir.

Q. Mr. Sudekum, did you open up any other theatres here in Nashville?

A. Well, the Fifth Avenue Theatre was started by Mr. Waller and Mr. Furlong and it had got the walls up and they ran into some difficulties and wanted to make some kind of a sale of it and I bought out, I think, a half interest with them at that time and finished the building and opened it up.

Q. When was the first time the Crescent opened up a theatre outside of Nashville, do you recall that?

[fol. 2291] A. No, I don't. I think it was Columbia, Tennessee. I don't think they had a theatre there and we opened up a theatre in Columbia, but I don't know the date. That must have been twenty-five years ago.

Q. Now, you told us about having someone to play the piano and have these songs on the screen, flashed on the screen; how long did that continue, that kind of music?

A. Well, that continued for some time.

Q. What was the next kind of music you had in the theatre?

A. Well, they had, to start with, they had these little grind organs, little pianos out in front of the theatre that would play and attract attention, then it went on into automatic organs and things, and big instruments that furnished music and that would change to band instruments and the like of that. After that they came along with these synchronized machines that would have a couple of turntables and also have a library of records and automatically play music that would be suitable to the scene of the picture. After that, that was followed then by organs that came in and of course the big houses would have big orchestras at that time, but more generally the smaller houses would have these organs put in, some few would have organs and orchestras, and then after that, of course, the talking pictures came in. They were doing mostly everything at that time to bolster the business because the picture business

[fol. 2292] was getting very quirt and talking pictures came along and just give it a big boost at that time.

Q. What did you all do with your big organs? Were they expensive?

A. Well, we gave them away to different organizations; we gave one to Hobson's Chapel and one to the Tennessee Industrial School and different places.

Q. Were the organs expensive?

A. Well, they cost five or ten or twelve thousand dollars.

Q. When did the sound movies first start in, say along about what year?

A. I don't know.

Q. Was it in the 20's, the early 20's?

A. I couldn't guess. Some little time—We had the first sound movie in Tennessee, the first sound picture at the Knickerbocker Theatre in Tennessee.

Q. What did you pay for that sound picture equipment at the Knickerbocker?

A. I think about $23,000.00 or $27,000.00. I have forgotten. An awful price.

Q. Was that, you say, the first theatre equipped for sound?

A. That was the first one in Tennessee equipped for sound. They had boxes all over the Boulevard.

[fol. 2293] Q. Had what?

A. Big boxes, big crates, fifteen or twenty men running around there in the theatre, popping their hands and snapping their fingers to get the acoustics. Now, a couple of men can bring it in.

Q. Well now, was that sound on discs?

A. That was on discs, records.

Q. Now, you have sound films?

A. Now it is on films, yes sir.

Q. That equipment now isn't near as expensive as the other, is that correct?

A. Of course, now nobody uses those discs anymore; they were in big boxes and had a lot of expense for transportation. Then the sound film was pretty expensive at first but now it has got down more reasonable.

Q. Mr. Sudedum, on June 30, 1929, I will ask you if you did not have the following theatres in the following towns: Ritz and Star in Alabama City, Alabama. The Capitol, the Diamond, the Princess and the Opera in Bowling Green, Kentucky, Capitol in Clarksville. Princess and

Vogue in Columbia, Tennessee. Princess and Dyer and Star in Decatur, Alabama. Palace and Capitol in Gadsden, Alabama. Princess and Rex and Alhambra, in Hopkinsville, Kentucky. Princess and Temple in Harriman, Tennessee. Palace in Halls, Tennessee. Princess and Howard in Lebanon, Tennessee. Princess in Murfreesboro, Tennessee. Princess and Strand, in Morristown, [fol. 2294] Tennessee. Palace, and Princess in Maryville, Tennessee. Princess in Obion, Tennessee, Capitol in Paris, Tennessee. Princess in Ridgely, Tennessee; and Princess in Springfield, Tennessee; Virginia Dare in Tiptonville, Tennessee. Capitol in Union City, Tennessee?

A. Yes sir.

Q. That is a total of 38 theatres in 21 towns?

A. Yes sir.

Q. I notice at that time you had theatres in Obion, Ridgely, and Tiptonville, and Halls, Tennessee. Did you dispose of those theatres?

A. Yes sir.

Q. Are those little towns?

A. Yes sir.

Q. Why did you ever buy those theatres in those towns, how did you happen to acquire them?

A. We had to take those with the Dyersburg deal when they sold out the two theatres in Dyersburg, they had those and we had to take them in the deal.

Q. You mean, the man or company or party that you purchased the Dyersburg theatres from also had theatres in those other four small towns?

A. Yes sir.

Q. What did you do with those theatres?—That is, the ones in the four small towns?

[fol. 2295] A. We got rid of them the best we could.

Q. Sell them?

A. Well, practically gave them away.

Q. Now, I will ask you if on June 30, 1940, if the Crescent Amusement Company—June 30, 1941, I mean—if the Crescent Amusement Company did not have the following theatres in the following towns? The Ritz, in Alabama City. Capitol and Diamond and Princess in Bowling Green. Capitol in Brownsville, Tennessee. Bohemia and Princess in Cleveland, Tennessee. Capitol and Lillian in Clarksville, Tennessee. Lyric and Princess in Columbia, Tennessee.

[fol. 2296] Mr. Armistead (Continuing). Princess and Roxy and Capitol in Decatur, Alabama; Capitol and Frances in Dyersburg; the Earl and Roxy in Earlington, Kentucky; the Roxy in Franklin, Kentucky; the Gadsden, Capitol and Princess in Gadsden, Alabama; the Roxy in Gallatin, Tennessee; the Capitol and Palace in Greeneville, Tennessee, and the Princess and Prince in Harriman, Tennessee; Alhambra, Kentucky and Princess in Hopkinsville, Kentucky; Princess and Ritz in Lebanon, Tennessee; Capitol and Cameo in Madisonville, Kentucky; Capitol and Park in Maryville, Tennessee; Princess and Ritz in Morristown, Tennessee; Princess and Roxy in Murfreesboro, Tennessee; Capitol and Princess in Paris, Tennessee; the Capitol in Princeton, Kentucky; Princess and Capitol in Springfield, Tennessee, and the Capitol and Ritz in Union City, Tennessee?

A. Yes sir.

Q. That is a total of forty seven theatres in twenty three towns?

A. Yes sir.

Q. Now, since August 11th, 1934 I will ask you if the Crescent Amusement Company has not entered and opened theatres in the following towns; Greenville, Tennessee——

Mr. Wright: Excuse me a minute. As I understand it, this information is, where they had gone in in August, 1934, has already been introduced in evidence in the answers to the interrogatories. Now, is this information any different [fol. 2297] from that?

Mr. Armistead: No. but his answers haven't been introduced in evidence.

Mr. Wright: I understood that the acquisitions since August 11th, 1934 have been read in evidence, is my understanding.

Mr. Armstead: I don't recall. Anyhow, I want to question him about these theatres.

The Court: All right. Go ahead.

By Mr. Armistead:

Q. I will ask you since August 11th, 1934 if the Crescent Amusement Company has not entered the following towns: Greeneville, Tennessee, Earlington, Kentucky, Franklin, Kentucky, Gallatin, Tennessee, Brownsville, Tennessee and Princeton, Kentucky?

A. Yes.

Q. Now, let's take the situation at Greeneville, Tennessee. There was at the time you entered that town,—I think the proof shows that Parrott and Hendren were operating two theatres there? Why did Crescent enter Greenville, Mr. Sudekum?

A. Well, I had had numerous letters from different people there wanting to know if we would not build a house [fol. 2298] there, and the town looked like a good town and the theatre wasn't so good, and I tried for sometime to get a location there, and I never could get a location, get a good location until one day one of the fellows of the Chamber of Commerce called me and asked me if I still wanted a place there and I told him Yes, and he said, "Well, two stores—"

Mr. Wright: Just a minute. If the Court please, I object to all this recital of what went on between Mr. Sudekum and——

The Court: Well, it is hearsay testimony.

Mr. Armistead: That is correct; it is hearsay.

Mr. Wright: I might say that it is not quite clear to me just what evidence has been offered as part of the plaintiff's case that this evidence is supposed to rebut. In any event, I don't see the materiality of it.

The Court: Well, just a general background.

Mr. Armistead: Well, I understood it was the theory of the Government that the Crescent had been expanding and going out and getting all these theatres, and going into these towns for the purpose of running out the opposition. I wanted to ask him why he went into Greeneville, Tennes- [fol. 2299] see. I think that is material.

Mr. Wright: There is not any question in the record but what he did expand and he did run out the opposition. Now, I don't see how this sort of testimony either adds or subtracts from the record that has been made.

The Court: Well, that is a question for the Court to say. Overruled.

Mr. Armistead:

Q. Did you construct a theatre in Greeneville, Tennessee?

A. Yes sir. It was Mr. Kizer at the Chamber of Commerce, was the man that kept writing me all the time and insisting that we come over there and build a theatre.

Mr. Wright: Now, if the Court please, we object to that sort of thing.

The Court: Sustained.

By Mr. Armistead:

Q. Did you or not have requests from citizens of Greeneville that Crescent come into Greenville and construct or open up a house?

A. Yes sir.

[fol. 2300] Mr. Wright: That is objected to as a conclusion, as to what the citizens of Greeneville wanted. The only people that could tell us that would be the citizens themselves. He is not in a position to say here that he went into Greeneville to fill a great public need. He can give us his own conclusion that that was the effect.

The Court: He is just saying he had requests from citizens to come in and open up a theatre.

Mr. Armistead:

Q. Have you a picture of your theatre in Greeneville, Tenn.?

A. Yes sir.

Q. I am going to hand you a picture and ask you whether or not that is a picture of the Crescent Theatre at Greeneville, Tennessee?

A. Yes sir.

Q. Will you file that as Defendant's Exhibit No. 74?

Mr. Wright: We object to it without any further identification—are you going to identify that as to when it was taken?

Mr. Armistead: Yes.

Mr. Wright: We object to it without any further identification as to when it was taken, who took it and what it is [fol. 2301] supposed to show.

The Court: What difference does that make?

Mr. Wright: I don't know what difference the picture of the theatre makes in any event, but what is the purpose of the offer?

Mr. Armistead: The purpose is to show that the Crescent Theatre in Greeneville, Tennessee, from this picture, is a very attractive, modern and up to date house. I am going to prove that by Mr. Sudekum, that it is a modern, up to

date theatre and far superior to the theatre that was there when we entered Greeneville.

Mr. Wright: Well, what it is today has got nothing to do with what it was at the time he entered. Now, if that is a picture of it at the time he put up the theatre, it might have some relevancy but just what he is offering it for—I don't see what kind of theatre he has got there today as compared to what was in Greeneville when he went in there, has any bearing whatsoever ever on the proposition that he is advancing.

By Mr. Armistead:

Q. Does this picture substantially represent the theatre [fol. 2302] that you constructed there in Greeneville, Tennessee?

A. Yes.

Q. And is that the same theatre that is standing there now?

A. Yes.

Mr. Wright: I still think we are entitled to know when the picture was taken before it is offered.

The Court:

Q. Do you know when the picture was taken?

A. No.

Mr. Wright: Well, we object to it.

The Court: Overruled; go ahead.

By Mr. Armistead:

Q. Now, Mr. Sudekum, can you tell us approximately the amount Crescent spent in constructing that theatre there?

A. About, my guess would be $35,000.00, remodelling the theatre. We don't own the property.

Mr. Wright: Without interrupting, may we have a general objection to this entire line of testimony as to cost and appearance of theatre buildings?

The Court: All right, Sir.

[fol. 2303] Mr. Wright: So far as we are concerned it has nothing whatsoever to do with it.

The Court: Well, it may not. That is a question for the Court to decide later on. The Court may hold that the mere

fact that they went in there and put up an expensive find theatre wouldn't be any excuse for a violation of the Sherman Act at all but that is a question for the Court to pass on.

Mr. Wright: I take it that we may have the same objection without repeating it to each of these questions?

The Court: All right.

By Mr. Armistead:

Q. You say the Crescent doesn't own the property but has it under lease, is that correct?

A. Yes sir.

[fol. 2304] Q. Now, let's come to Earlington, Kentucky. I believe the proof shows that Mr. Dozier was operating a theater there when Crescent entered that town. Have you a picture of the theater operated by Mr. Dozier in Earlington, Kentucky? I hand you here a picture and ask you if that is a picture of the theater that Mr. Dozier was operating in Earlington, Kentucky?

A. Yes, sir.

Q. Where was that theater located in Earlington?

A. Well, it was about a block around the corner from the town; I don't know the streets there, the old opera house there.

Q. Will you file that as Exhibit No. 75 to defendant's proof in this case?

A. (Yes, sir.)

Mr. Wright: We object to this, also, on the specific grounds that there is no evidence whatsoever as to when this was taken, or the conditions under which it was taken.

Mr. Armistead: Well, does that picture that I have asked you about—the Dozier theater—does that substantially represent the condition of the theater, the appearance of it there as you saw it, the theater?

[fol. 2305] A. The theater?

Q. Yes, sir.

A. Yes, sir.

Mr. Wright:

— When, what time?

A. Today; it looked about like it does today, or when it was taken.

Mr. Wright: Well, here is a picture of the theater, taken today, after it has been closed for two years; what possible relevancy has that got to this lawsuit? If they closed it down and it is lying there, what of it?

Mr. Armistead: All right; I want to show it had steps to go up; and I want to show the Crescent Theater here as a comparison.

The Court: There is no question about that.

Mr. Armistead: It had steps the first time you ever saw it?

A. Yes, sir.

The Court: All right.

[fol. 2306] Mr. Armistead: I just want to say this: If this is incompetent evidence——

The Court: I think we are just wasting time about something that is not important.

Mr. Armistead: Well, the plaintiff thinks it is very competent evidence, as they have been going over Kentucky taking pictures.

The Court: We will pass on that when we get to it.

Mr. Armistead:

Q. I show you here a picture of a theater in Earlington, Kentucky, and I will ask you if that is a picture of the theater constructed there by the Crescent Amusement Company?

A. Yes, sir.

Q. Will you file that as Defendants' Exhibit No. 76?

A. (Yes, sir.)

Mr. Wright: Same objection.

The Court: Overruled.

Q. Now, Mr. Sudekum, the theater at Greeneville, Tennessee; does that have modern conveniences in it and nice [fol. 2307] appointments?

A. Yes, sir.

Q. How does that theater compare with the theater which was being operated by Parrott & Hendren when Crescent entered Greeneville?

A. Well, it was a much nicer theater than that one.

Q. You mean the Crescent Theater was a modern, up-to-date theater?

A. The other was an old house.

Q. Now, how much did Crescent invest in that Earl Theater at Earlington, Kentucky?

A. I think about twenty or twenty-three thousand dollars.

Q. Does it have modern conveniences and good equipment?

A. Yes, sir.

Q. Now, when Crescent purchased the Roxy Theater—Mr. Dozier's theater—did it also operate the Earl Theater, or did it close it, or what happened to the Earl?

A. We closed the Earl Theater and operated the Roxy for a while.

Q. Why did you close the Earl and operate the Roxy?

A. Well, it was less expensive to operate the Roxy and I thought if we couldn't operate it we could be saving some money.

Q. Well, did you continue to operate the Roxy?

[fol. 2308] The Court: Was the Roxy the one that had steps up to it?

A. Yes, sir. Well, we had a petition, and the merchants came down to see us about it, and it looked like they wouldn't permit us to operate the Roxy; so we had to go back to the Earl.

Q. I hand you these papers and ask you what that is?

A. That is one of the petitions that was sent down to me or brought down, I don't know which.

Q. From citizens of Earlington?

A. Yes, sir.

Q. A petition for what?

A. To reopen the Earl Theatre instead of the other one.

Q. Well, after you got that petition, did you reopen the Earl?

A. Yes, sir.

Q. And closed the Roxy?

A. Yes, sir.

Q. Now, Franklin, Kentucky: When did Crescent enter Franklin, Kentucky?

A. I wouldn't know the date.

Q. Well, it had been there for several years, had it not?

A. Yes, sir.

Q. Was there a theater there when Crescent went into Franklin?

[fol. 2309] A. Yes, sir.

Q. Do you remember who was operating that theater?

A. No, I don't.

Q. Do you remember where it was located?

A. Around the corner from the main street; I don't know the name of the street.

Q. Now where is the Crescent Theater located?

A. Well, it is on the main street, just a few doors off of the corner?

Q. Was there any particular reason that Crescent opened up a theater there in Franklin, Kentucky?

A. Well, it looked like a good place, and we were going through there all the time going to Bowling Green, and the Masons had a lot they wanted to sell——

Q. Well, did you discuss the matter with any of the citizens there in Franklin?

A. Yes.

Q. What was the attitude of the citizens of Franklin?

Mr. Wright: I object to that, if your Honor please.

The Court: Sustained.

Mr. Armistead:

Q. I hand you here a picture, and ask you if it is a picture [fol. 2310] of the opposition theater in Franklin, Kentucky?

A. Yes, sir.

Q. Will you file that as Defendant's Exhibit No. 77?

A. (Yes, sir.)

Q. I hand you another picture and ask you if it is a picture of the Crescent Theater in Franklin, Kentucky?

A. Yes, sir.

Q. Will you file that as Defendant's Exhibit No. 78?

A. (Yes, sir.)

Q. Can you tell me approximately how much Crescent has invested in that theater in Franklin, Kentucky?

A. About fifty or fifty-five thousand dollars, I should think.

The Court:

Q. Fifty-five?

A. About fifty or fifty-five, somewhere along there.

Mr. Armistead:

Q. Is that a modern, well equipped, up to date theater?

A. Yes, sir.

Q. Now, Gallatin, Tennessee: The proof shows that Crescent opened this theater in Gallatin, Tennessee, on or

about November 4, 1937. A picture of that theater is already in the record. Now, can you tell us approximately how much is invested in that situation?

[fol. 2311] A. Well, we have a large theater, and some stores and offices there, and a big parking lot, and I think we spent about one hundred and eight or one hundred and ten thousand dollars on the project there.

[fol. 2312] Q. Well was that a modern, up to date, well equipped theatre?

A. Yes, sir.

Q. Where is that located?

A. That is right on the main street there.

Q. Now I hand you a picture and ask you if that is a picture of the opposition theatre in Gallatin, Tennessee? My attention has been called to the fact, may it please the Court, that is a picture of Mr. Roth's theatre.

The Court: That is already in the record.

Mr. Armistead: Yes, sir.

Q. Now, Mr. Sudekum, I believe the proof shows that Crescent entered Brownsville, Tennessee, in 1935; what kind of a show or theatre was there when Crescent entered Brownsville?

A. It was a store-room show.

Q. That is the one operated by Mr. Lawing?

A. Yes, sir.

Q. How did the Crescent theater when it opened up, what kind of theatre is that?

A. It is a pretty nice theatre.

Q. Well equipped?

A. Yes, sir, good equipment.

[fol. 2313] Q. Is it larger than the Lawing Theatre, the theatre there operated by Mr. Lawing?

A. Yes, sir.

Q. Now you mentioned the fact that since August 11, 1934, Crescent had entered these towns, that the last one is Princeton, Kentucky; what kind of a theatre has Crescent in Princeton, Kentucky?

A. A very nice theatre.

Q. Did Crescent construct the theatre?

A. Yes, sir.

Q. Is it a modern up to date theatre, well equipped?

A. Yes, sir, very good.

Q. How much has Crescent invested in that situation?

A. I think about eighty-five or ninety thousand dollars.

Q. I hand you here a picture and ask you if that is a picture of the Capitol theatre in Princeton, Kentucky?

A. Yes, sir.

Mr. Wright: If the Court please, I will point out one additional objection, that is a town we did not offer any evidence on at all, Princeton, Kentucky.

Mr. Armistead: I think we are entitled to show the class of theatres the Crescent Amusement Company had.

[fol. 2314] The Court: All right, go ahead.

You asked him how much he had invested in the theatre at Brownsville?

Mr. Armistead: Yes, I overlooked that.

Q. How much did you have invested in the theatre at Brownsville?

A. About ninety-two hundred dollars. We didn't own the property I think.

Q. A leased building?

A. Yes, sir.

Q. Will you file this picture of the Crescent's Capitol theatre in Princeton, Kentucky, as defendants' exhibit number 79?

A. Yes, sir.

Q. Now, Mr. Sudekum, has Crescent gone into these towns and constructed these theatres, remodeled these buildings, for the purpose of running opposition out of town?

A. No, sir.

Mr. Wright: If the Court please, that is a pure conclusion.

Mr. Armistead: I think we h-ve a right to show what his intent was, and is, may it please the Court.

[fol. 2315] The Court: All right, I will overrule the objection.

Mr. Armistead:

Q. Mr. Sudekum, in the Crescent theatres has it been and is it the purpose of the Crescent Amusement Company to see that the public has conveniences and comfortable places to look at pictures?

A. Yes, sir.

Mr. Wright: Rather as an additional objection, I do not think that that is relevant to any issue in the case. Any-

body that is engaged in selling service to the public tries to please his public, I do not see how that is connected with this case whatever.

The Court: I may decide it does not have anything to do with it. Overruled.

Mr. Armistead:

Q. Now, Mr. Sudekum, do you go around from time to time and inspect these Crescent theatres?

A. Yes, sir.

Q. Sir?

A. Yes, sir.

Q. Do you keep in touch with your managers?

A. Yes, sir.

[fol. 2316] Q. How do you select your managers, have any of them been with you any appreciable length of time?

A. Well there is no set way of selecting them, just try to get good men, agreeable to get in with people, and if we get somebody that we think is all right, they usually stay with us. We have managers that have been with us fifteen, twenty or twenty-five years at some locations, still get along all right.

Q. How do you pay your managers, are they on a fixed salary or other basis, or what?

A. We paid them a salary for a long time, but I talked with Woolworth's managers, different concerns and kind of got their system and kind of figured out one of our own, where they give them so much a week, and a percentage over that in addition to their salaries.

Q. Do you find that is an incentive to get these managers to work harder and get more patrons in the theatres?

A. Yes, sir, they will do everything they can to increase the business.

Q. Now, Mr. Sudekum, I wish you would tell us some of the methods that Crescent uses to exploit pictures?

A. Well they have various different ways, or kind of extra ballahoo, inside displays, and anything that they can think up to attract the attention to get people interested in pictures.

[fol. 2317] Q. Well do they take steps like that to attract the public to get them in the theatre?

A. Well there *there* are very few pictures you do not.

The Court: Kind of like a circus parade?

A. That is right, get them interested in the pictures.

Mr. Armistead:

Q. Do you have contests between managers?

A. Yes, sir, we have different contests during the year, where we have certain kinds in certain months, where we have good prizes, and then we help them out with it all we can by suggestions and bookings, special bookings, things like that to see if we can't help them win some prizes.

Q. What are those prizes?

A. Well this last one I think the big prize was a thousand dollars.

Q. You mean the first prize was a thousand dollars?

A. Yes, sir.

Q. What campaign was that?

A. I think they called it the Lake Campaign.

Q. Do you have them every year?

A. They do not in the same way all the time, different kinds.

Q. Tell me something about this Campaign, how is it conducted, how do you find out who is entitled to the prize, what [fol. 2318] is the basis of the contest?

A. Well certain increase of business over the same time the year before. We try to have it as fair as we can. We have a prize for the best exploitation stunt. We have a prize for the best scrap book, or advertising displays, stunts, extra advertising, things like that, take pictures that we put into the scrap book, they put them in and send it in and we get somebody, some of the other managers that may not be interested in that particular contest, or the paper people, or somebody to take it and see which one wins the prizes.

Q. You mentioned a scrap book; I hand you this and ask you if this is the book kept by the manager of the theatre at Harriman, Tennessee, and I call your attention to a picture South of Suez, and ask you if the manager at Harriman, Tennessee, advertised that picture in the manner set out in that scrap book?

A. Yes, sir.

Q. I wish you would for the purpose of the record, I will ask you if it does not have a picture of Brother, Sister, Mother, Grand-mother, father and Grand-father, all of them billed as an advertisement, and state that the whole family is going to see South of Suez?

A. Yes, sir.

Q. Now were those methods adopted by them?

[fol. 2319] A. Yes, sir.

Q. And that was adopted by the manager at Harriman, so far as the advertising the picture?

A. Yes, sir.

Q. That was a kind of a novel bill?

A. That was kind of a novel bill, and a little different from anything else we had.

[fol. 2320] Q. Did that idea originate with him, or did Crescent suggest it to him?

A. I suppose it originated with him.

Q. I hand you another scrap book for the Princess Theatre in Columbia, Tennessee, in which there is an advertisement relative to the "Penny Serenade", and ask you if that is the method adopted by the Manager at Columbia, Tennessee, to advertise the picture?

A. Yes, sir.

Q. Now, I notice that it has "Good morning. Be sure to see 'Penny Serenade' with Cary Grant and Irene Dunn at the Princess Theatre today and Monday." How did he advertise, what did he do with those bills or hand-bills?

A. Well, he would tack those on laths and go around town to the residences and stick them up in the lawn so that when they came out in the morning they would see that sign there "Good morning. Be sure to see 'Penny Serenade'."

The Court: Did he have another man to come around and clean them up?

A. He would like to let them stay as long as he could.

Mr. Armistead:

Q. Now I hand you one in which the picture "Road to Zanzibar" is advertised. I will ask you if the Manager at Brownsville, Tennessee used any particular method to exploit or advertise the picture, if so, tell us what he did?

[fol. 2321] A. Well, this is a photograph where he has some colored fellows with another colored fellow with some leopard skins on, riding on some poles around the town.

Q. Was that advertising that picture?

A. Yes, sir, that is a South African picture.

Q. Now, I hand you a scrap-book of the Roxy Theatre at Decatur, Alabama, and in that is an advertisement of the picture "The Philadelphia Story". I will ask you if the

Manager there used any particular method of exploiting or advertising that picture, if so, what?

A. Well, that is a hanger to put on the door knob at homes.

Q. You mean, that goes around the door knob, the top of that, and right under that is the advertisement of the pictures?

A. Yes, sir.

Q. Now, there is one from Gadsden, Alabama. I will ask you if the Manager there used any particular method to advertise the picture, "Kentucky Moonshine", and if so, please tell us what course he adopted or pursued in advertising that picture?

A. This is the letter he sent out.

Q. Just read into the record that method he used to advertise, just read that letter?

A. (Reading)

Dear Miss Weaver:

The Princess Theatre and its patrons, who have [fol. 2322] signed this letter are delighted at the success you have attained in motion pictures and have a feeling of genuine pride in the fact that Gadsden was at one time your home.

As a token of appreciation and in order that you may know that we do hold you in great esteem the undersigned movie fans of Gadsden signed this letter at the theatre when they came to see your latest picture "Kentucky Moonshine", Sunday and Monday, May 22nd and 23rd.

Due to the crowds at rush periods, there were several thousand who did not have an opportunity to sign the letter, however, all were in accord to acclaiming and expressing themselves that you have reached new heights in "Kentucky Moonshine", and we send our best wishes for your continued success and happiness.

Q. Now, I hand you a scrap book kept by the Manager of the Capitol Theatre in Princeton, Kentucky, and ask you if he adopted any particular methods to advertise the picture "Scattergood Bains"?

A. That is a hand-bill he got out there.

Q. What does that hand-bill say?

[fol. 2323] A. It says:

"Wanted!—100 Carpenters, 50 Bricklayers, 30 Plasterers, 20 Electricians, 200 Laborers—Their Families,

Friends, and all other citizens of Princeton to see and enjoy "Scattergood Baines"—Clarence Budington Kelland's beloved character of American Magazine and radio fame now on the screen with all the homespun philosophy, sage, wit, that has made him a favorite for more than twenty years—at the—Capitol Theatre—Tues. & Wed., May 27-28."

Q. Now, those are, I believe, from Alabama, Kentucky, East Tennessee, Middle Tennessee, and West Tennessee?

A. Yes, sir.

Q. Now, all of those Managers entered these contests, is that right?

A. Yes, sir.

Q. And those were the methods adopted by each Manager that I have questioned you about as his idea as to how to [fol. 2324] advertise a picture?

A. Yes, sir.

Q. Mr. Sudekum, these managers, do they encourage them to mix with the citizens in the community in which the theatre is located?

A. Yes, sir, we do everything we can to get them to be a part of the town and to take an interest in things in the community.

Q. Do you suggest that they join civic organizations such as the Rotary Club?

A. Yes we pay their dues in whatever ones they belong to.

Q. Are the Crescent Theatres, from time to time, used by citizens for public meetings?

A. Well, not so much the public meetings, as the Churches and Sunday Schools and like that.

Q. Do you make charges for them?

A. No.

Q. How about vacations for your managers, do you allow them to have vacations?

A. Yes, all of them have two weeks vacation with pay.

Q. Now, every December, does Crescent have, in all of its towns, any show for the benefit of the under-nourished, or under-privileged children?

A. Well, I wouldn't know right now about all the towns. That is the usual custom for them to do it. I think they all [fol. 2325] are doing it.

The Court: You put on an aluminum drive a week or so ago, didn't you?

A. Yes, a very big one.

Mr. Armistead:

Q. Mr. Sudekum, would Crescent rather see and prefer to have a house full of patrons with cheap admission prices, rather than to have the same amount of revenue with higher admission prices and have the house half full of people?

A. We would rather have the volume of business than to see the house half-filled with a few people. People enjoy the shows better when they have got a good crowd.

Q. Is it more or less a habit that you try to get the public into, to go to the theatres and see the pictures.

A. Yes, I think it is more or less a habit.

Q. Now, there has been introduced in evidence some income tax returns of Crescent. Does Crescent sell popcorn at its theatres?

A. Yes, sir.

Q. Does it sell screen advertising?

A. Yes, sir.

Q. Does it also derive revenue from the rental of offices and buildings?

A. Yes, sir.

[fol. 2326] Q. Does or not the amount of revenue produced from those sources amount to a substantial sum?

A. Oh yes.

Q. Well now, take the Hippodrome, in Nashville, does the Crescent derive substantial revenue from the rental of that to various parties?

A. For rental and roller skating. Roller skating has been very good for the last two or three years.

Q. Do you have popcorn, is that sold in all of your theatres?

A. Well, most all of them. There might be some few that don't handle it; popcorn, soft drinks and candy.

Q. Well now, how do they get that popcorn? Is it kept in one central place, do they get it from one central place, or how is that handled?

A. We have standing orders with a wholesaler to ship so much a week to each one of the places and we keep a supply here. We have a special concrete room to keep it in, we keep a supply here in Nashville.

Q. Now, Mr. Sudekum, did you ever tell anyone that you, or Crescent Amusement Company, could get pictures and they could not?

A. No sir.

Q. Did you ever tell anybody that if they didn't sell the theatre to Crescent, or to you, that Crescent would open up [fol. 2327] another theatre and put them out of business?

A. No sir.

Q. Did you ever make the statement to anyone, in substance, that if he didn't sell his theatre to you, that he would have a hard time getting pictures?

A. No.

Q. Did you ever authorize Mr. Lee Castleberry to make any statement about Crescent's ability or non-ability to get pictures, or did you ever authorize Mr. Castleberry to make the statement to anyone, that if they didn't sell out that the Crescent would enter the town and put them out of business, that Crescent could get the pictures and they couldn't.

A. No sir.

[fol. 2328] Mr. Wright: That is objected to on several grounds. In the first place, the answer is virtually putting the words in the witness's mouth by Mr. Armistead; and in the second place, it is a pure conclusion as to what Mr. Castleberry did, what conversations he had. He can say just what Castleberry's duties were, what he did, what conversations he had with him and what he may have told him to do.

The Court: He can state whether or not he ever told Mr. Castleberry any such thing or whether he ever knew that Mr. Castleberry ever did any such thing.

By Mr. Armistead:

Q. Did you ever until this lawsuit started hear, or until the trial of this case started, I mean, hear of any contention—I mean any statement alleged to have been made by Mr. Castleberry that Crescent would see that they couldn't get pictures?

A. No sir.

Q. What does Castleberry do anyhow?

A. He is manager of the Fifth Avenue Theatre.

Q. Here in Nashville?

A. Yes sir.

Q. Does he do a lot of driving for you, drive you around?
A. Yes sir.
Q. Has he been doing that for a long number of years?
A. Yes sir.
[fol. 2329] Q. How long has Castleberry been with you?
A. I don't know; sometime.
Q. He is one of your oldest employes, is he not?
A. No, not that but he has been there quite a while, ten or twelve or fifteen years maybe; ten or twelve years.
Q. Does he take any part in or has he ever taken any part in the purchase of pictures for Crescent?
A. No, he never did.
Q. Does he know what pictures Crescent negotiates for?
A. He don't know anything about the pictures.

Mr. Wright: If the Court please, Mr. Castleberry can testify as to what he knows better than Mr. Sudekum can.

By Mr. Armistead:

Q. Has Mr. Castleberry ever been present when you were negotiating for the purchase of any films?
A. No. He might have walked through the room or something like that but he never had nothing to do with any deal at all.
Q. Does Castleberry know what pictures he is going to get at the Fifth Avenue Theatre until they are booked for him?
A. No. There may be some few that he might ask for—to try to get them for him, would be the only thing. He wouldn't know what he was going to get.
Q. Now, Mr. Sudekum, have you at any time instructed Mr. Rosenbaum what pictures to buy?
[fol. 2330] A. No sir.
Q. Does he do his own buying?
A. Does all his own buying; has always.

Mr. Wright: That is a conclusion as to what Mr. Rosenbaum did or what he instructed him to do. He can state whatever conversations he had with him and describe what the relationship was, but just to say that Mr. Rosenbaum negotiated his own film buys, I don't think meets the issue of whether or not Mr. Sudekum had anything to do with it.

The Court: Well, he has already stated he didn't have anything to do with it; that he had never instructed Mr. Rosenbaum about buying any films.

By Mr. Armistead:

Q. Now, I wish you would please tell us something about film buying. Do these distributors have film salesmen who come around and call on you from time to time?

A. Yes sir.

Q. Well, tell us something about that. Do you make a contract with them right away?

A. Well, there is no special way that I know of to go about it. They usually come in right after a salesmeeting and tell you how good everything is going to be, how much bigger and better it is going to be than last year, and wind up by telling you how much more they want than they got [fol. 2331] last year. You just hardly can't do anything with them. I mean you can't make any deal. And then they, some of them get mad and go out and come back again maybe in a few days or a week or something like that and go over the same thing again, and that goes on until you finally get together some way or another.

Q. Well, do you purposely wait until late in the season to buy pictures for Crescent?

A. No, we don't. We buy them whenever we can; whenever we can get together.

Q. Do you have any difficulty in getting together with them?

A. Well, they just, it looks like, try to wear you out to where you just break down and give them anything they want to get rid of them. I take them and ride them around until train time so they won't have a chance to talk with me.

Q. Now, who does the purchasing of films for the Cumberland Amusement Company?

A. Cowan Oldham.

Q. Has he been doing that for some time?

A. Well, he has until Mr.—since Mr. Hill gave it up. Mr. Hill got sick.

Q. That reminds me—there is in the record Government Exhibit No. 176, a letter from Mr. Avey to Mr. Connors, dated August 17, 1937, in which it is stated:

> "He then informed me that he merely wanted to learn what he could from each company's representative and make his buying plans afterwards, and that [fol. 2332] Mr. Sudekum, who owns a considerable interest in the Hill circuit, had requested them not to buy at what he called this early date. He also stated

that he doubted if they would ever make a deal until after the Sudekum deal was made."

Now, did you ever instruct Mr. Hill or request Mr. Hill not to buy any particular product?

A. No sir. He may have talked to me about things at different times but he always did his own buying.

Q. Now, when Mr. Crute was living did he purchase films for Lyric?

A. Yes.

Q. Now, there is an inter-office communication, Government's Exhibit No. 201, which is as follows: "Sold new product here with the exception of three top features, Crute has just returned from Nashville and said Sudekum told him to lay off them. I have personally talked to Sudekum over the phone and he advised me that he had instructed both Crute and Rosenbaum at Florence to lay off percentage this year."

Is that correct or not?

A. I guess so because I didn't think percentage buying was very wise at that time.

Q. Well, did you instruct Crute not to buy?

A. No, I didn't instruct him not to because they would have went ahead and done it anyway if they had wanted to.

Q. How about Rosenbaum?

A. Rosenbaum, the same.

[fol. 2333] Mr. Wright: He has already testified that the statement there is correct and now he is attempting to impeach his own witness here by having him say it wasn't correct.

Mr. Armistead: No, I am not endeavoring to do that at all.

Mr. Wright: Well, the answer was quite clear that what was stated there was correct.

Mr. Armistead: I asked him did he instruct Rosenbaum to lay off percentage pictures.

Mr. Wright: Before that you had asked him if what the salesman had reported in the exhibit was correct and he stated it was.

The Court: He said "He guessed so"; he didn't think percentage buying was very good at that time.

By Mr. Armistead:

Q. Did you understand the question?

A. What was it?

Q. This inter-office communication here says this: "Sold new product here with the exception of three top features. Crute just returned from Nashville and said Sudekum told him to lay off them. I have personally talked to Sudekum [fol. 2334] over the phone and he advised me that he had instructed both Crute and Rosenbaum at Florence to lay off percentage this year." That is what this salesman writes to the home office and the salesman is Sands of Warner's, and that is an inter-office communication of date August 23, 1935.

A. I don't know anything about that. What I mean was we probably had discussed the percentage arrangement sometime earlier. I don't know about that date or about that letter, and I know nothing about the telephone call.

Q. Sir?

A. I don't know anything about that telephone call.

Q. I know but I am particularly anxious to find out whether or not you ever instructed Mr. Crute not to buy percentage pictures?

A. No.

Q. And I also want to know whether or not you did instruct Rosenbaum not to buy percentage pictures?

A. No.

Q. Sir?

A. No.

Mr. Wright: He has already testified he didn't remember, whether he did or not; he didn't remember anything about the conversation. Now, he is telling us that he didn't.

The Court: That all goes to the weight of the testimony.

[fol. 2335] By Mr. Armistead:

Q. Now, did you ever tell T. C. Hutton or his son—you remember that young boy who testified here from Jefferson City in east Tennessee?

A. Yes sir.

Q. Did you ever tell either one of them that you had gone into a town in West Tennessee or any other place and taken practically all the business from the opposition?

A. No.

Q. Did you ever tell Tim Smith that Harriman and Morristown were not large enough for two theatres?

A. No.

Q. Did you ever tell a distributor that if it wanted your business or wanted to do business with Crescent it would have to refrain from selling your opposition pictures?

A. No.

Q. Did you ever tell a distributor that if it didn't sell Crescent in a particular town that Crescent wouldn't buy films from it for the other towns?

A. No.

Q. Did you ever tell a distributor how much it should charge for its films—I mean charge the opposition for films?

A. No.

Mr. Wright: What was that last question?

(Question read by reporter.)

[fol. 2336]. By Mr. Armistead:

Q. Do you know what film rentals are being paid by independents?

A. I wouldn't know.

Q. In the past have the salesmen representing distributors told you how much some operator in a near-by town close to one of your towns, Crescent towns, was paying for films?

A. I don't remember a single instance. I wouldn't believe them if they did.

Q. Well now, why do you make that statement?

A. Well, they would probably tell me so high I wouldn't believe it.

Q. Did you ever tell any distributor that it had to take its product from the opposition house and sell it to Crescent?

A. No.

Q. Now, Mr. Sudekum, there has been filed in this case a paper on which there is some data relative to a Fox franchise and you were questioned about that the other day. Do you remember that your name was signed to that paper?

A. Yes.

Q. Who were you representing when you signed that?

Mr. Wright: Now, if the Court please, that is a pure conclusion. There is a memorandum that speaks for itself.

It has got the companies listed there and it has Mr. Sudekum's signature on it and I don't think there is anything.

[fol. 2337] The Court: Yes sir, Crescent Amusement Company by Tony Sudekum, if I remember correctly.

Mr. Armistead: That is exactly right, your Honor. Now, what I want to ask him now: Were you signing that or did you sign that as a representative of or on behalf of Rockwood or Muscle Shoals?

A. Just the Crescent Amusement Company.

Mr. Wright: I object to that,—a contradiction of the instrument itself.

The Court: Well, if it is a contradiction, of course, the objection is good.

Mr. Armistead: I don't think it is a contradiction, may it please the Court.

The Court: Well, let's see the instrument. Is it at your office?

Mr. Armistead: No, it is here. It is Exhibit No. 286.

The Court: All right. Let's take a short recess while you find it.

(Recess.)

[fol. 2338] Resumption after recess.

The Court: Did you find that exhibit?

Mr. Armistead: No, sir; I expect it is at my office, may it please the Court.

The Court: All right, we will pass over that.

Mr. Mitchell: It is in the exhibits of July 22nd.

The Court: Well, let's go ahead to something else.

Mr. Armistead: Q. Mr. Sudekum, these pictures which you were questioned about, were they taken in the usual course of business, is that customary, for Crescent to take pictures of its theaters?

A. Yes, we try to keep pictures of all our places.

Q. In other words—this is a little leading—but those pictures were not taken for purposes of this lawsuit?

A. No; we had them.

Q. Now, I hand you a picture and ask you if it is a picture of the Princess Theatre at Gadsden, Alabama?

A. Yes, sir.

Q. Will you file that as Exhibit No. 80 to Defendant's proof?

[fol. 2339] A. (Yes, sir.)

Q. Now, can you tell us what Crescent had invested in that theatre, approximately?

A. I think something over a hundred thousand dollars.

Q. Sir?

A. I think something over a hundred thousand dollars.

Q. Now, I will ask you if the theatre at Columbia, Tennessee—What is the name of that?

A. Princess Theatre.

Q. Princess Theatre; if you have from time to time remodeled that theater?

A. Yes, sir.

Q. Have you made extensive changes in it?

A. Yes, sir.

Q. Why did you do that?

A. Well, it had steps in it at first; we took those out first, and we changed it about, about three times that it has been remodeled.

Q. I hand you a picture and ask you if it is a picture of the Princess Theater at Columbia, Tennessee?

A. Yes, sir.

Q. Will you file that as Exhibit No. 81 to defendant's proof?

A. Yes, sir.

[fol. 2340] Q. Now, what is the investment that Crescent has in that theater?

A. I think about fifty or sixty thousand dollars.

Q. Now, I hand you a picture and ask you if it is a picture of the Capitol Theater at Clarksville, Tennessee?

A. Yes, sir.

Q. What is the investment that Crescent has in that theater?

A. I think about one hundred and five thousand dollars.

Q. Now, I hand you a picture and ask you if it is a picture of the Princess Theater which was recently opened at Decatur, Alabama?

A. Yes, sir.

Q. Will you file that as Exhibit No. 82 to Defendant's proof?

A. Yes, sir.

Q. I hand you a picture and ask you if it is a picture of the Capitol Theater at Union City, Tennessee?

A. Yes, sir.

Q. Will you file that as Exhibit No. 84 to Defendant's proof?

A. Yes, sir.

Q. What investment has the Crescent in that situation?

A. Which one?

[fol. 2341] Q. At Union City?

A. I think about thirty-five thousand dollars.

Q. Now, I will ask you if this is a picture of the Capitol Theater at Paris, Tennessee?

A. Yes, sir.

Q. What is the investment that Crescent has in that situation?

A. About seventy-five thousand dollars.

Q. Will you file that as Exhibit No. 85 to Defendant's proof?

A. Yes, sir.

Q. Now, I hand you a picture and ask you if it is a picture of the Princess Theater at Morristown, Tennessee?

A. Yes, sir.

Q. What is the investment that Crescent has in that?

A. About ninety thousand dollars.

Q. Now, I hand you a picture and ask you if it is a picture of the Princess Theater at Harriman, Tennessee?

A. Yes, sir.

Q. How much is the investment in that situation?

A. About eighty-five or ninety thousand dollars.

Q. Will you file that as Exhibit No. 86 to the defendant's proof?

A. Yes, sir.

[fol. 2342] Q. I hand you a picture and ask you if it is a picture of the Capitol Theater at Brownsville, Tennessee?

A. Yes, sir.

Q. Will you file that as Defendant's Exhibit 87?

A. Yes, sir.

Q. Now, Mr. Sudekum, there has been a letter introduced in this record which you wrote Mr. Morgan, that you own a half of Cherokee; is that correct, that you own a half of Cherokee?

A. No, sir.

Q. And also a letter that has been introduced where you wrote Mr. Baird that you owned a half interest in Cherokee; is that correct?

A. No, sir.

Q. Why did you make those statements?

A. Well, I suppose, Stengel, my son-in-law, he was looking after them; I might have said I had a half interest,

among other things; I might say I have a home, and it don't belong to me, it belongs to my wife.

Q. How is that; I didn't catch that?

A. I say I might say I have a home, and it don't belong to me, it belongs to my wife; I just probably told them that.

Q. Now, I will ask you if Cumberland Amusement Com-
[fol. 2343] pany was not looking for a location to construct a theater in McMinnville, Tennessee, long before, or years before, the Center Theater opened there?

A. Yes, sir.

Q. Do you know that of your own knowledge?

A. I went there a couple of times, several times, to help find a location.

Q. Was that before you ever had any knowledge or had ever heard that the Center Theater was going to open up?

A. Yes, sir.

Q. Mr. Sudekum, did the Crescent at any time ever purchase a film or picture and not play it for the purpose of keeping it away from the opposition?

A. No, sir.

Q. Now, does the Crescent Theater generally show Western pictures on Fridays and Saturdays?

A. Mostly Saturdays.

Q. Why is that?

A. Well, the Saturday crowd look like they like Westerns better than anything else you can show.

Q. Well, does the Crescent derive more revenue from showing Westerns on Friday and Saturday than it does from other pictures shown during the week?

A. Yes, sir.

[fol. 2344] Q. Now, how much more revenue does Crescent get, would you say, from showing Western pictures than it does from showing the general run of pictures?

A. I wouldn't know that.

Q. Well, does it amount to a substantial amount, or a small amount?

A. Well——

Mr. Wright: I object to that; we submit, if the Court please, that the books and records are the best evidence, and Mr. Sudekum says he doesn't know, and I judge he wouldn't be permitted to——

Mr. Armistead: I imagine he had dollars and cents in mind when he said he doesn't know.

The Court: Well, the best evidence would be the records.

Mr. Armistead:

Q. Now, before Crescent entered Gallatin, Tennessee, do you know how many shows Mr. Roth was showing there during the week?

A. From only what I heard about it; I heard he only ran one show.

Q. How about matinees?

[fol. 2345] Mr. Wright: We object to that, may it please the Court.

The Court: Sustained.

Mr. Armistead:

Q. Well, you kept up—or did you keep up with opposition houses, I mean, with the operators in various towns, and find out generally how many times they were showing a picture, making changes, or how often they kept the theaters open?

A. No, I don't know that I kept up with that so well.

Q. Now, Mr. Stengel, is your son-in-law, I believe you stated?

A. Yes, sir.

Q. When did he become connected with Crescent, about what year?

A. I wouldn't know what year; sometime——

Q. Well, what business was he in before he came with the Crescent?

A. He was with Caldwell & Company, stocks and bonds, salesman.

Q. Well now, did he have any experience in the picture business before he became affiliated with Crescent?

A. Well, he told me he used to work in the Post room in [fol. 2346] Chicago, I believe, when he was a kid; that is about all I know.

Q. Now, how did he get along; did he catch onto the business quick, or was he slow or——

A. Very good.

Q. Now, did he discuss with you about buying any theatre for himself?

A. Yes, sir.

Q. Which one?

A. The first one was Tracy City.

Q. Then did he discuss with you any other theaters, the purchase of any other theaters?

A. Yes, sir.

Q. Which one?

A. I think Rockwood, I believe.

Q. Now, do you remember when the Rockwood Amusements was incorporated?

A. No.

Q. Well, Mr. Sudekum, most of the towns that the Crescent Amusement Company operates theatres in, are they larger or smaller than the Rockwood towns?

A. They are larger.

[fol. 2347] Mr. Armistead: Just a moment, Your Honor, I think I am about through. (Consults)

Your Honor, we have located this Government's exhibit 286. This is in connection with the Fox franchise, and signed Crescent Amusement Company by Tony Sudekum, and there are no other signatures on the paper. I believe that is all, may it please the Court. (Exhibit passed to the Court.)

The Court: Well, of course that memorandum is signed Crescent Amusement Company by Tony Sudekum. As I recall the objection was made to the memorandum as to whether or not he was signing for any other company other than the Crescent Amusement Company. Of course on its face he was signing for the Crescent Amusement Company. However the memorandum will have to be looked at as a whole, it covers a number of other towns, several of which were not in the Crescent circuit. It is a memorandum for a franchise for all of those towns as a whole, some of which belonged to other companies.

Mr. Mitchell: May it please the Court, my only objection to that exhibit was that it was not admissible in evidence as [fol. 2348] against Muscle Shoals Theatres, because that other things introduced by testimony and records, that Muscle Shoals Theatres was dissolved as a corporation, to years before that date, in 1937, and at the time of the institution of this suit, and for two years prior to that time, covered by that piece of paper, Mrs. Nettie Sudekum owned

a one-half interest in the Muscle Shoals Theatres, and Rosenbaum the other half.

The Court: I do not think it would be evidence against the corporation, Muscle Shoals Theatres; it would be competent evidence against the partnership, if that is what you have in mind.

Mr. Mitchell: The point was that Mr. Sudekum's signature on here had no effect unless it was shown he had a representation through agency from the partnership, and there is nothing to show that the Crescent Amusement Company signed that piece of paper. Crescent Amusement Company had no dollar of investment at that time it was claimed by the Government that the signature of Crescent on that paper was an indication that Muscle Shoals and Crescent was of one concern. He called it that, that is not [fol. 2349] proof of agency, and that as proof of agency was not even admissible.

The Court: I think the purpose for which the Government introduced this memorandum was to show that the Crescent circuit and its affiliates, together with the partnership, Muscle Shoals Theatres, all figured in one deal, for the franchise, and that Mr. Sudekum approved it on behalf of Crescent Amusement Company.

Mr. Mitchell: And we said that could only be admissible if it were indicated by some measure of proof that Sudekum had some authority to tie our situation into that one piece of paper.

The Court: Did you get the franchise?

Mr. Mitchell: We got the franchise, we did indeed, our objection was to this piece of paper.

The Court: I will overrule the objection as to the memorandum, and overrule the objection to the question asked the witness by Mr. Armistead, relative to who he was signing for, the paper shows itself who he was signing for.

[fol. 2350] Mr. Armistead: Shall I proceed?

The Court: Yes, sir.

Mr. Armistead:

Q. Mr. Sudekum, I forgot to ask you if the Crescent got into financial difficulties in the twenties?

A. Yes, sir.

Q. Did you sell any theatres, and if so, where?

A. We sold one in Jackson, Tennessee, and one in Columbia, two in Knoxville and one in Clarksville, I believe that is about all I remember.

Q. This sound equipment you said you paid twenty-thousand dollars for that was placed in the Knickerbocker; that was sound on disks; when sound on films came in, what did you do with that equipment that was in the Knickerbocker?

A. It was no good, with sound on films coming in.

Q. Sir?

A. They were no good, you couldn't get any records for them any more, they just quit making them.

Cross-examination.

By Mr. Wright:

[fol. 2351] Q. Mr. Sydekum, in connection with this business of exploiting pictures, you gave the kind of exploitation a particular situation may require, do you not?

A. They had their own ideas about that.

Q. Sometimes—I notice in this same book on Gallatin, Tennessee, of another method of exploitation that the manager used there; they had a lottery of bed room furniture?

A. Yes, used that a lot of places.

Q. And at the time you ran this lottery there was a competing theatre there, wasn't there?

A. Yes.

Q. That is not a method that would primarily be used?

A. Oh yes, it would, we used it in nearly every place.

Q. You found that that is one way of attracting business from the competing theatres?

A. That is one way of attracting business anywheres.

Q. The primary object of anything you do in connection with showing the pictures is to attract business to your theatre, isn't it?

A. That is right.

Q. And where there is a competitor, the primary object is to attract business from him, from the competitor's business to yours?

A. Go get all the business you can.

Q. And the business where you have competition comes to [fol. 2352] some extent from him?

A. No, I wouldn't know whether it is his business or not.

Q. You wouldn't care?

A. No, sir.

Q. And sometimes in exploiting a picture it is better not to give a picture particularly good exploitation?

A. I don't know what you mean by that.

Q. Where you have a percentage picture, you may be thinking about a future deal, you may not want that percentage picture to do very well?

A. That is right.

Q. That happens, doesn't it?

A. That happens.

Q. And so in those cases you might not give the picture any exploitation at all?

A. Well no, we wouldn't probably spend as much money on it.

Q. Well you might not spend any at all, if you thought it was advantageous not to do so in making your next film deal, is that right?

A. You can't hardly keep a manager from doing that, if he is in on a percentage arrangement.

Q. Here is a letter of February 21, 1940, from Mr. Cowan Oldham; I will ask you to read that and see if that refreshes your recollection on that point?

A. Yes, but I don't know hardly what it means.

[fol. 2353] Q. Read the second page.

A. Well that is the way it is, I don't spend anything on percentage pictures.

Q. Well in this statement he makes here, we have played off this and it is not very good, from a percentage from Warner but did not gross much money for I did not spend anything for advertising it, is a correct statement?

A. I do not know, that is Cowan Oldham.

Q. The letter was written to you?

A. Yes, but I don't know what he told him.

Q. What?

A. I don't know what he told his manager.

Q. You had no reason to believe that is not correct, have you?

A. It may be, he says he was trying to get on and arrange to make a franchise.

* * * * * * *

[fol. 2354] Q. When you said when Oldham negotiated, you didn't want the Court to get the impression that you didn't discuss them with him, did you?

A. He probably talked to me about them, but he always made his own deals.

Q. You don't want the court to get the impression that you didn't give Oldham advice and assistance in connection with film deals?

A. I want him to get the impression I didn't ever make the deals.

Q. I don't think the reporter was able to get the question, may be, you interrupted before I finished. Let's try again. I say you didn't want the Court to get the impression, did you, that you didn't discuss film deals with him and give his assistance and advice in connection with them?

A. That is right.

Q. And the same is true with respect to Mr. Rosenbaum, isn't that right?

A. Well, he talked sometimes about it. I didn't see him very often.

Q. Well, you saw him often enough to keep track of what is going on in the Muscle Shoals Theatre business?

A. No, I wouldn't say that.

Q. He testified that he came up here and talked to you a couple of times a month. Do you think that is wrong?

[fol. 2355] Mr. Mitchell: I object to the question because the testimony is not as stated in the question. He said he talked to him every two months or so. The question suggested is not as stated, is not quite true.

The Court: Yes, I recall the witness said once every month or so, or month or two, something like that.

Mr. Wright: Isn't that what I said?

The Court: No, you said twice a month.

Mr. Wright:

Q. I will correct it to whatever the testimony was, that he came up every month or so and talked to you, is that right?

A. I don't know, I don't have any record of when he comes. He comes sometimes, just drops in.

Q. When you said he negotiated his own film deals, you didn't want the Court to get the impression that you and he never sat down perhaps and negotiated a deal at the same time with the film companies, did you?

A. He has negotiated hundreds of them I never heard of.

Q. I know, but just answer the question.

A. What was the question?

(Question read by the Reporter)

A. Well, we talked about it.

Q. When he made a franchise deal, you and Mr. Rosen-
[fol. 2356] baum and Mr. Stengel would all talk to the film representative together, isn't that right?

A. We might have all been together, yes.

Q. And worked out the deal together?

A. No, I worked out my own and they worked out theirs.

Q. But in the course of working these out together, you knew what was being done on their situations, just as they knew what the deal was in yours?

A. Not necessarily so. I probably heard what their deal was, they might have heard what mine was, I don't know whether they did or not.

Q. They could have heard from you all sitting down together and working out the deals, couldn't they?

A. Well, he wasn't there when I was making my deal, but they usually went out and made their own deals.

Q. You mean, you would leave the room while Stengel and Mr. Rosenbaum talked, and that Mr. Stengel and Mr. Rosenbaum would leave the room while you talked?

A. Not exactly that, no. Usually, they would go upstairs in Stengel's office and carry on.

Q. You might happen to be in there all the time?

A. I have not been in Stengel's office upstairs, I don't guess, twice in a year.

Q. You and Mr. Stengel and Mr. Rosenbaum were all
[fol. 2357] associated together and had negotiations with Metro on the 1939-1940 product didn't you?

A. That might have been, he could have been there.

Q. You didn't buy any 1939-1940 product during the 1939-1940 season, neither did Rosenbaum or Stengel, isn't that right?

A. Well, I don't know about the years. There was a couple of years we didn't buy them.

Q. 1939-1940 all three of you didn't get together?

A. I don't know, I don't know whether Mr. Rosenbaum did *not* or did not, I couldn't say.

Q. You say you don't know?

A. I don't know, no sir.

Q. Although you were negotiating a deal with Metro with Rosenbaum and Stengel, you now say you don't know whether Rosenbaum made a deal or not.

A. I am telling you I don't remember, I don't remember every conversation, there are so many of those things going on in the business of film deals, I don't remember.

Q. That was a fairly important one, wasn't it, talking about a five-year franchise?

A. Well, there was very little talk about it.

Q. You don't make a five-year franchise every day, do you?

A. I didn't make that one. I asked them about it and they said, no, they wouldn't make no five-year franchise.

[fol. 2358] Q. You don't remember whether Rosenbaum made a franchise with them or not?

A. No sir.

Q. You haven't any idea to this day whether he has one or has not?

A. No sir.

Q. When it comes to building a theatre, you build the theatres that you think will make you the most money in a particular situation where you put it, isn't that right?

A. We try to build a nice theatre.

Q. Sometimes when you put a theatre into a situation to prevent somebody else from coming in, you may not build such a nice theatre, isn't that right?

A. To prevent somebody from coming in?

Q. Yes.

A. I don't know how we could ever do that.

Q. You never heard of a situation like that, where you might lease a house or build one because you were afraid that somebody else was going to come into the town?

A. Oh, well, that may be true.

Q. And in some of those situations, you would build just enough of a theatre to keep the other fellow out, without much regard to how good it was, wouldn't you?

A. No, we usually build one for a second house with a view of catering to the farm trade with cheap admission prices.

[fol. 2359] Q. Does the farm trade require any rest room?

A. I should think so. I don't know why they wouldn't as much as any other.

Q. You opened a theatre out here in Lebanon, Tennessee, a short time ago, didn't you?

A. Yes.

Q. A second house, as you call it?

A. Yes.

Q. A converted store room?

A. Yes.

Q. How long ago did you open it?

A. I don't know, several months ago.

Q. It hasn't got any rest room facilities, has it?

A. Yes.

Q. You say it has.

A. Yes.

Q. When were they put in?

A. When it was built.

Q. Do you know the name of the theatre I am talking about?

A. The little house, I don't know the name. Built it off the Square there.

Q. It is in a store about 18 feet wide, isn't it?

A. I don't know how wide the store show is, it is a small house.

Q. A converted store building?

[fol. 2360] A. It was a show there, here several years ago, then remodeled into a store and then we put it back into a theatre.

Q. You put it back into a theatre because you heard somebody might come in there?

A. I heard that somebody might come in there, but the reason I took it was because a man wanted to fix up the building for us at a reasonable rent and we said, all right, go ahead and fix it.

Q. It was one of the reasons, and one of the reasons, too, was that you thought somebody might come in and operate it, if you didn't?

A. There is always that danger of somebody coming in.

Q. The danger was particularly imminent at that time, at the time you opened?

A. No, I don't think so, because I heard that in all the towns, the same party, at least, three or four of the towns and nothing ever happened.

Q. Out here in Murfreesboro, you picked up a second house a couple of years ago, didn't you, when you heard somebody was coming in there?

A. We got a second house; I heard rumors there, too.

Q. The house you put in there was a converted store show?

A. It was a store then, yes sir.

Q. You didn't open that house until just a few months [fol. 2361] ago, did you?

A. No, it has been some time ago.

Q. How long ago?

A. Well, I thought you said two years ago, awhile ago.

Q. That is when you acquired it?

A. Well, we started to work as soon as we got possession of the building.

Q. But you didn't open it for a year and a half after you acquired it, did you?

A. Well, I wouldn't know when we acquired it, but I think the people in there had a pretty long time for their lease to run; as soon as we got possession of the building, we went to work on it.

Q. But you had it leased for a long time, at least a year and a half or two years before you opened it?

A. I say, I don't know how long we had it. Just as soon as we got possession of the building, we went to work on it.

Q. Can you tell us where those rest rooms are in this theatre, this second house?

A. Well, on the side.

Q. Which side?

A. On the right hand side as you go in.

Q. On the right hand side as you go in?

A. Yes sir.

[fol. 2362] Q. Have you got signs on them or marks?

A. I don't know as they have, I don't think they have signs on them.

Q. Are they secret rest rooms?

A. Kind of secret, yes sir. I have been in them.

Q. Are you talking about rest rooms you maintain for the use of your employees, or something that is there for the public to use?

A. Everybody uses it, employees and the public.

Q. Why don't you have a sign on them?

A. I couldn't say whether there is a sign on it or not, myself.

Q. Are you ashamed of them?

A. Well, yes.

Q. In a number of situations, you have leased a theatre and just kept them closed so that they couldn't be opened or run by anyone else, isn't that right?

A. No. The only reason we keep them closed is because we don't think we can make any money out of them where we have got one closed.

Q. Yes, but you continue to lease them for substantial periods of time, even after they are closed, isn't that right?

A. If we have a lease on it, we have to pay the rent.

Q. Sometimes you go on and renew the leases?

[fol. 2363] A. That is right.

Q. Isn't that correct?

A. That is right. We may hope to open it up some time if business conditions get better, we might want to open it up.

Q. You always want to be in position where, if competition does materialize, you can reopen?

A. No, we like to be in position where we can take care of the public if the situation demands it.

Q. The extent to which you are willing to take care of the public frequently depends, does it not, on the particular competitive situation that you find yourself in?

A. No, I wouldn't say that.

Q. You don't think that is so?

A. No sir.

Q. You had some theatres at Dyersburg, Tennessee, they were in very poor condition, up until a year ago, isn't that right?

A. No, I wouldn't say they were in poor condition.

[fol. 2364] Q. They were so bad there were numerous complaints from the people of Dyersburg about them, is that not right?

A. No, I never heard no complaints.

Q. You never heard of that?

A. Most of the complaints we had was because we built a new one at Union City and Paris and the people, some of them, thought they ought to have a new theatre there. We had been looking for a lot to buy there for the last two or three years.

Q. They saw what you had done in the competitive situations and they wondered why they couldn't have——

A. That is right.

Q. — good service in Dyersburg where there wasn't any competition?

A. Well, they had good service there but they just wanted something better.

Q. Well, let's see if I can refresh your recollection on that. I show you a letter dated June 22, 1940 from your manager at Dyersburg and I will ask you to read that.

(Wintess reads letter to himself).

A. Yes, I got it.

Q. Now, that you have read that letter, do you recall that the Frances Theatre was in terrible condition there?

A. No, it is not in a terrible condition.

Q. I don't mean what it is now. I said what it was at the time this letter was written.

A. It is now just like it was then. That is where the [fol. 2365] manager was a relief manager and had been there for two weeks, a young boy, and he just wanted something to write about.

Q. When he says here: "The floor is just about ready to fall in and is patched with tin in some places; the walls look very bad and the ornamental work has started falling. At least, a piece fell about a month ago." You think that was just a figment of his imagination?

A. I think so.

Q. He never saw a piece fall?

A. I think so, yes. He said "about a month ago." He said the floor "is falling in."

Q. Did you take a look at the theatre after you got the letter?

A. No.

Q. You didn't?

A. No.

Q. Then you don't know whether—you don't have any reason to believe that is not so, isn't that true?

A. I know the floor couldn't fall in when it is on the ground.

Q. You don't think the floor might deteriorate as long as it is on the ground, is that it?

A. I don't think it could fall in.

Q. And you don't think it would be possible for the plaster on the walls to fall?

A. That might be, but the manager has been there a long time and I had rather pay attention to what the manager says than a boy just there on relief.

[fol. 2366] Q. Well, you just did nothing about then after you got this letter?

A. Well, I won't say that. They might have put new carpets in.

Q. Might have what?

A. Might have put new carpets in. They were talking about fixing it up but I don't know whether it has been all attended to or not. The main thing if, I would like to buy a better location there and build a better theatre, in a better location, if we could. I was down there *here* sometime ago looking at a piece of property that somebody had for sale.

Q. You might be a little faster about making up your mind about a new location if it appeared that somebody else was going to come into Dyersburg, is that right?

A. I don't know.

Q. That might hasten your decision?

A. I am ready to buy it now if we can get a place and start building.

Q. Well, as a matter of fact, what determines your decision as to what to do in all these situations is whether you can do it profitably or not, is that not right?

A. You mean building a house?

Q. Yes.

A. Yes, we like to think it is going to be profitable.

Q. Now, Mr. Sudekum, I believe you testified on your direct examination that you didn't know what film rentals [fol. 2367] were paid by independent operators. Now, that statement just isn't true, is it?

A. Yes, I think so. I don't remember knowing about any of them.

Q. You don't? Don't you ever remember being asked to assume a contract that an independent had made in a theatre that you took over?

A. Yes sir. Then I would know when we took over a contract.

Q. Very definitely?

A. Yes sir, because we assume the contract.

Q. Yes, and the practice is ordinarily not to assume the contract but to make a new contract because the independent —the rentals called for by the independent contract are more than you care to pay, is that not right?

A. Well, sometimes. What I mean by that was the salesman wouldn't tell me what other people would pay.

Q. Well, they show you the contract they have when they ask you to assume it, wouldn't they?

A. Well, the salesman wouldn't. The man that is selling me a theatre would ask me to assume the contract and then he would give me the contract.

Q. Well, the company itself would want you to assume it, wouldn't they?

A. Yes sir.

Q. They try to get you to assume it?

A. That is right.

Q. And in most cases you decline to assume them, is that [fol. 2368] not right?

A. Well, I wouldn't in most cases. In some cases we don't assume them.

Q. And in those cases where you don't assume them you buy pictures at a much cheaper rate than that called for by the contract they ask you to assume?

A. Well, we would try to. I don't know whether we are always successful or not.

Q. Well, if you weren't successful there wouldn't be any point in not assuming the contract, would there?

A. Well, they want you to assume them.

Q. And you don't want it?

A. Well, that depends on what they are.

Q. But in any event, in the course of the discussion about contracts you find out very definitely what the independent has been paying for films and there is no doubt about that?

A. They give me the contracts.

Q. All you have to do is to read them to know what the independent has been paying?

A. That is right.

Q. Now, Mr. Sudekum, you testified on direct examination about this amount of money that you get from the Westerns and other pictures and you have records, do you not, showing exactly what comes in from all the Crescent theatres every day, is that not right?

A. We get a report.

[fol. 2369] Q. Get a daily report?

A. Yes sir.

Q. And you get a daily report also from all the houses that are operated by companies in which the Crescent has a financial interest too, don't you?

A. Well, I don't know whether we get a daily report or weekly report or monthly report on them.

Q. Well, you get reports on all of those theatres?

A. We get some kind of report on them.

Q. That includes Cumberland?

A. Cumberland, yes sir.

Q. And these reports, whether they are daily or weekly or monthly, show all the receipts of the theatre and the expenses that are paid out, is that not a fact?

A. That would show it, yes sir.

Q. And you also have a record of the——

A. It wouldn't show who it was paid to or the items, itemized, anything like that.

Q. Then you have a record showing the films that are played there and the dates the receipts were taken in, do you not, also?

A. Well, that would have the name of the picture on it, if it is a daily report.

Q. I say the names of the feature pictures?

A. It wouldn't have what was paid for it or anything like that.

Q. Well, you also keep a record, don't you, of what you [fol. 2370] pay the distributors for the particular feature pictures that play those houses?

A. No, we don't, only the Crescent Amusement Company.

Q. Well, your Crescent Amusement Company records show you what was paid for each picture that played Crescent houses?

A. Yes, Crescent theatres.

Q. And then at the end of the year from these reports you have a profit and loss statement on the performance of each theatre?

A. Well, we don't get it from each theatre. The Crescent Amusement Company wouldn't care——

Q. I didn't understand your answer.

A. The Crescent houses do.

Q. You have for your Crescent houses an annual profit and loss report for each theatre?

A. That is right.

Q. How about with respect to houses on which you have been getting reports, which are operated by subsidiaries of Crescent?

A. Well, we get a yearly statement from them.

Q. A profit and loss statement?

A. Yes.

Q. For the company?

A. For the company.

Q. How about for the theatres?

A. We wouldn't get it for the individual theatres.

[fol. 2371] Q. But you have records available to make it up if you want it?

A. Oh yes, could be.

Q. Now, Mr. Sudekum, you recall that your deposition was taken last June, on June 17th, I believe. You remember giving your deposition in this case?

A. Yes sir.

Q. And then before you signed it you read it over and you made some corrections in the testimony you had given there. You attempted at that time to make all the corrections that were necessary in your testimony?

A. No, I did not. There were some there that I didn't think amounted to anything; I didn't try to correct it. I read it over very hurriedly.

Q. Well, there was a statement that you recall—do you recall making the statement in the deposition that there was no connection between the sale of your theatres to Warner Brothers and the negotiation of the Warner franchise?

A. I don't think there was.

Q. That would be your testimony now?

A. Yes sir.

Q. Have you examined the agreements that were put in evidence here?

A. No.

Q. I call your attention to the fact that those agree-
[fol. 2372] ments or that the franchise, the original franchise was negotiated on the same date as the theatre sale agreement, and that when the theatre deal was settled, by the same instrument that settled the theatre deal the franchise was extended. Does that refresh you?

[fol. 2373] A. Well, I wouldn't think that would make any difference.

Q. Would that refresh your recollection, on that report?

A. No, I wouldn't think that would make any difference because they just wanted a franchise for the pictures.

Q. You don't want to correct this statement, then, that you made, that there wasn't any connection between the sale of your theaters to Warner Brothers and your franchise; that is your testimony now, is that right?

A. I don't think there was; I don't remember any.

Q. You state now there was no connection, is that right?

A. I don't think there was.

Q. And I think you also stated that at the time that that position was taken you made the statement you would have to take whatever clearance the distributor told you you could have; that is a statement that is quite obviously incorrect, isn't it?

A. No, I don't think so.

Q. You don't think you have ever been able to get a clearance that distributor might have been reluctant to grant you, is that so?

A. Well, I think I would have to be satisfied with what he wanted to give me.

Q. You recall instances where you were able to obtain clearance where the distributor didn't want to give it?

[fol. 2374] A. Well, that might happen; we might be able to persuade him to let us have our way one time.

Q. In any event, your statement that you had to take whatever clearance the distributor told you you could have, was clearly incorrect, isn't that right?

A. No, that is generally true.

Q. Now, in some cases you were able to get the clearance after the contracts had already been made without any clearances, isn't that right?

A. That might have been; that might have happened.

Q. Do you remember in the current Warner franchise you were able to get clearance that they told you that you couldn't have, do you recall that?

A. No, I didn't fool with the clearance much after the deal was made.

Q. Well, you recall, don't you, that you did get clearance?

A. No, I don't.

Q. Now, another statement which you made at the time your deposition was taken was a statement if in a particular situation the other man had a product, you wouldn't negotiate for it, because you wouldn't feel like taking it away from the other man; do you remember making that statement?

[fol. 2375] A. Well, that is about right.

Q. That is right? That is your testimony now?

A. Yes, sir.

Q. You don't want to correct that statement?

A. No, sir.

Q. And you recall testifying further that if you needed film, where you said if you needed film in a particular situation and an independent had played it, he would still get it whether he wanted it or not; is that your testimony now?

A. I didn't understand that exactly.

Q. The testimony that you have at the time your deposition was taken was the statement that if we needed a film in a situation and the independent was playing it, he could still get it whether he wanted it or not?

A. That he could still get it whether he wanted it or not.

Q. That he could still get it whether he wanted it or not?

Mr. Mitchell: May it please the Court, we object to the question, because it seems that——

The Court: Overruled.

A. Well, I don't quite understand that; you mean that——

Court here adjourned for noon recess. Until 1:30 P. M.

[fol. 2376] Resumption after Recess:

Mr. Wright:

Q. The testimony that you gave at the time your deposition was given, to which I referred before the recess, which you said you couldn't understand is as follows, at page 239: You were asked "Q. Well, as far as you were concerned, if you needed a film in a particular situation, the mere fact that some independent had been playing it before you wanted it, wouldn't make any difference, would it? A. What is that question? (Question read by the Reporter.) A. Sure, it would make a difference; he would still get it whether he wanted it or not." Now, that answer plainly isn't true?

Mr. Armistead: Now, may it please the Court, I respectfully submit—and I say it most respectfully—that that is improper cross-examination. In the first place, Mr. Sudekum isn't questioned on direct-examination about that in the least, about these deals and the independent, but as I understand, the plaintiff came out and made out his case along that line of cross-examination——

Mr. Wright: This question goes to Mr. Sudekum's credibility, and these are statements made under oath in the [fol. 2377] course of the proceedings, whether it related to the issues we are trying in the suit; we are entitled to show that he made statements under oath in that connection which were not correct, as reflecting upon his credibility. It doesn't matter whether he was asked that on cross-examination or not. We are entitled to have his testimony given in the suit with reference to the issues.

The Court: Well, I haven't enforced that rule strictly with reference to cross-examination; the question itself might be objectionable as formed; as I recall, after reading the statement, the question that is asked, is, "That is clearly untrue?"

Mr. Wright: I should have asked him first: Do you recall making the statement, and of course, after he had said that—I will withdraw the question and I will proceed and read the colloquy.

Mr. Waller: We object to reading anything out of the deposition. Rule 26 provides this, in taking a deposition: "Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the [fol. 2378] proponent as a witness." Now, Mr. Sudekum hasn't testified about these things at all. Now, he brings up a matter that he hasn't testified about and asks him didn't he testify about it, and then proceeds to ask him if he didn't testify to a falsehood; that is the fact about it. The rules of Civil Procedure authorize the use of that deposition for the purpose of contradicting something that the witness may have said in the course of his testimony. Now, this is not what they are trying to do. Now, it is entirely outside of any proper use of the deposition.

Mr. Dobey: The rules provide that a deposition of an adverse par y may be had for any purpose.

Mr. Raftery: Circumstances change in different cases. If Mr. Sudekum had testified differently to what he is being asked, under the ordinary rules of impeachment then Mr. Wright would have the privilege of reading the question and the answer merely to contradict something he has testified to. That is the established rule—that you can't use the deposition just for any purpose, as Mr. Waller says. You can use it for what the rule provides. [fol. 2379] Mr. Wright: That is precisely what the rules

provide. We are entitled to use this testimony that he gave under oath to impeach his credibility.

The Court: I think that would be true if you had the deposition filed.

Mr. Wright: What we are trying to do is not attempting to prove the truth or falsity of anything he said in this particular deposition; we are attempting to establish that Mr. Sudekum made false statements in the course of the proceedings.

The Court: It might involve the question of truth or falsity?

Mr. Wright: The primary purpose is that of impeachment. Now, there is no necessity to introduce the deposition unless he says, no, he didn't make those statements; but if I call his attention to the testimony first and he says, yes, I testified that way, then of course there is no necessity to introduce the deposition to show who made the statement; then we ask him whether or not the statement is true or not; then if he says it is not true and he has made a false [fol. 2380] statement, that fact may be considered by the court in evaluating all the other testimony he has given in the case which shows that he in the course of the proceedings made statements under oath which were not true statements, and that would show, as reflecting upon the truth or falsity of any other statements he may have made in the case.

Mr. Waller: Then according to that, your Honor, they could ask the witness: Didn't you five years ago, in the case Skipp against Jones say to Mr. Robertson that——

Mr. Wright: No, we are talking about the testimony relating to the issues in this case. I don't say for a minute that we could apply this to testimony given in some other case, as the only purpose is to test his credibility and answer questions and tell the truth under oath.

Mr. Armistead: Mr. Sudekum was not questioned about that at all on direct-examination.

Mr. Wright: It doesn't matter what Mr. Sudekum was questioned about on direct-examination; we are entitled to [fol. 2381] impeach his credibility on the statements that were made, in showing prior false statements made under oath in matters relative to the issues in the case in the same proceeding.

The Court: Well, as I recall, I allowed counsel for the defendants to cross-examine some of the witnesses for the

plaintiff on matters that were not covered by the direct-examination, for the purpose of reflecting on their credibility.

Mr. Mitchell: May it please the Court, on different phases of this testimony, as this question may arise again, and I am interested in it; it seems so entirely simple to me; it is like setting up a man of straw and knocking it down; this witness has not been interrogated by the Government on the point now submitted, and from his deposition taken before the trial he is reading some things that at the time of this testimony may have been relevant, and the next time it might be irrelevant. Didn't you tell this back in there, and isn't that a lie? That is not material in this case. But that is his best justification for putting it in here, that it [fol. 2382] is in this case; but if you want to prove a man is a purgerer, you prove his conviction for perjury. Of course, if it is relevant matter, the Court will pass on that question when the question is asked of this witness on the stand; and if his answer is not satisfactory to the Government, they can impeach him with the deposition.

[fol. 2383] But the idea of setting up every interrogatory in this deposition and every answer he makes, that are not necessarily in this court, on this testimony or anybody's testimony, or anybody else's testimony at all, and then say, isn't that a lie? It is just incompetent, there is no precedent for it, none can be offered.

The Court: I do not think that rule 26 applies in this matter at all. The deposition is not being offered for any purpose, but the witness is being cross-examined on statements which were made in the depositions, and it would be in the same category as any other statements made under oath, the matter is governed by rule 43, relative to the reception of evidence. This rule says:

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any [fol. 2384] case, the statute or rule which favors the reception of the evidence governs."

Of course under that rule the evidence would clearly be competent, because under the rule of the State of Tennessee, cross-examination has a wide latitude. In any case the statute or rule which governs,

"In any case, the statute or rule which favors the reception of the evidence governs, and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

Of course this evidence goes to the credibility of the witness. That has nothing to do with the competency of the evidence; but as I understand it, the cross-examination is being made on these previous statements which were made in a deposition for the purpose of testing the credibility of the witness; and not for the purpose of offering in evidence those statements about which he is examined. Is that correct?

[fol. 2385] Mr. Wright: That is correct, Your Honor.

The Court: I think the cross-examination is proper and the rules I have tried to follow in the examination of witnesses is to allow a little more latitude in cross-examination than is ordinarily allowed under the old Federal Rules of Evidence. All right, proceed, let the objection be overruled.

Mr. Waller: May I offer this further objection on this, which is plainly a typographical error, and the question and answer are wholly indefinite.

The Court: He can ask him that.

Mr. Wright: I am going to read to you, Mr. Sudekum, three questions that were asked, and the answers that you gave as they appear in the deposition, that you may tell me whether that is correct, whether that is a correct statement, and what was asked you and what you said at that time. The question is:

"Q. Well, as far as you were concerned, if you needed the film in a particular situation, the mere fact that some independent had been having *having* it before you wanted [fol. 2386] it, wouldn't make any difference, would it?

"What is that question?

And the question was read by the reporter, and then your answer: "A. Sure it would make a difference. He would still get it whether he wanted it or not.

Next question:

"Whether he wanted it or not would depend on whether you could offer the distributor a larger deal than he could, wouldn't it?

"A. No, sir, I do not think that is true."

Now, is that—do you recall having made those answers to those questions?

A. Yes, sir.

Mr. Waller: Your Honor is not ruling that a lawyer can cross-examine a witness, just take a deposition that was not being offered and reading some of it, and saying that is not true, is it?

The Court: He hasn't asked him that yet, he just asks him if he remembers making that statement. He says, yes. Let's see what he is going to ask him now.

Mr. Wright:

[fol. 2387] Q. Is that statement that you made then, are those answers you now regard as being true?

A. Yes, sir.

Q. You do not want to make any correction?

A. No, sir.

The Court: He says they are.

Mr. Waller: Now they want to prove they are not.

Mr. Wright: No, we do not want to prove they are not, a witness has somewhat under an obligation of his own.

Mr. Armistead: We object to that and ask that it be stricken from the record.

The Court: I do not think that is proper at this time; he may have had a different idea about it.

Mr. Wright: There is one more statement you made,——

A. I was thinking you meant by that if a independent theatre had product bought that he would still get the product if he wanted it, which I think is true.

Mr. Wright:

[fol. 2388] Q. Then your statement that he would get it whether he wanted it or not, was not correct, was it?

A. I do not quite understand that, whether he wanted it or not.

Q. You evidently——

The Court: Whether you wanted it or not, I do not understand exactly, I do not understand that myself.

A. I do not quite understand that.

Mr. Wright:

Q. Do you recall making this statement at the time when you built your Gallatin house, you were building and were not able to get pictures to put in there, just some that were not being used, you could get?

A. I probably did, I do not remember it, I probably made it.

A. I call your attention and see if this will refresh your memory.

Mr. Waller: We are renewing our objection to this type of cross-examination.

The Court: All right, overruled.

Mr. Wright:

Q. You customarily open a new house without having any [fol. 2389] prior arrangements for pictures.

The Court: I can't hear you.

Mr. Wright: The question is:

"Q. Do you customarily open a new house without having made prior arrangements for any product for it.

"A. Well when the Gallatin house was opened I was about the only man in the United States that ever built a house without he had any pictures to put in it.

Q. Without any pictures to put in it?

A. Yes, sir, just some not being used there that were no good."

Q. Do you recall making that statement?

A. Yes.

Q. Do you want to make any correction in that statement now?

A. No, sir.

Q. Your testimony is still you only got pictures there that the opposition did not want or hadn't used?

A. No, I didn't say altogether.

Q. What?

[fol. 2390] A. I didn't say we couldn't, I didn't say every one we used, I do not think that is true.

Q. Then your answer here, you said the—just some pictures that were not being used there, you do not want to leave the impression that the only pictures you could get were those that had not been used, is that right?

A. I did not know what we could get there at that time, I do not know what we got there at that time. That has been quite a while ago, I think most of the pictures we got were not being used there.

Q. You were questioned on your direct examination about these receipts from popcorn sales; you have records which show exactly how much you got out of popcorn sales, haven't you?

A. Yes, I guess we do.

Q. You have records which give the percentage or proportion of your receipts which came from rentals of store buildings you may have acquired in connection with your theater operations?

A. Yes, sir.

[fol. 2391] Q. The skating that is done in the Auditorium, that is leased to the operator?

A. Yes, leased to him.

Q. That is a separate subsidiary of the Crescent?

A. Yes sir.

Q. I will show you these memoranda dated July 1, 1938 and July 2, 1938 and ask you if those are in your handwriting?

A. No sir.

Q. Whose are they?

A. I don't know.

Q. They were produced in response to the subpoena by you and the Crescent Amusement Company.

A. I don't recognize the handwriting, I don't know whose it is.

Q. It was not prepared by you?

A. No sir.

Q. Do you know how it came into your possession?

A. No sir. Somebody else must have got it, I don't remember it.

Q. Did it ever come to your attention before?

A. No sir.

Q. You didn't take this out of the files, then in response to the subpoena?

A. No sir, I did not.

Q. Do you know who did?

A. I do not.

[fol. 2392] Q. Do you think you could find out about it?

A. I doubt it. I don't even recognize that writing. I could go around to the office, but I don't know what I could do.

Q. Will you make an effort to find out who did write the memoranda, which was taken out of your files?

A. Yes.

Q. Did I understand you correctly to say, on your direct examination that you never had talked to any film representative about selling or not selling your opposition?

A. No, I neve did that I remember, about not selling them.

Q. Do you ever recall having expressed disapproval when they were sold?

A. No sir.

Q. I show you a letter here from Mr. Page Baker, Branch Manager of RKO, dated April 11, 1936, in which he refers to a conversation with you, and ask you if that refreshes your recollection?

A. Well, this is somebody writing to Page Baker. I don't know; he might have told him that.

Q. Do you recall now telling Mr. Baker——

A. No sir.

Q. That you didn't like the idea of their selling the opposition in Brownsville?

A. I never told him that.

Q. You don't know whether you told him that or not?

A. I know I did not.

[fol. 2393] Q. You think he was mistaken here when he said you did?

A. I don't know what his idea was about it. I didn't tell him that.

Q. You testified that Mr. Castelberry has been working for you about ten or fifteen years?

A. Well, that is my guess; some time.

Q. Do you know what his nickname is.

A. Nickname?

Q. Uh-huh, what do you call him?

A. Mr. Castelberry, as ever I heard.

Q. Did you ever hear him called "Windy"?

A. No, I never did.
Q. You never did?
A. I never did.

Cross-examination.

By Mr. Mitchell, For Muscle Shoals Theatres:

Q. Mr. Sudekum, the Muscle Shoals Theatres Corporation was dissolved in August, 1937, was it not?
A. Yes sir.
Q. At the time of the dissolution, Crescent Amusement owned no stock in that corporation, did it?
A. No sir.
Q. Your wife owned a half interest and Mr. Rosenbaum owned a half?
A. Yes sir.
[fol. 2394] Q. Since the date of that dissolution, you have not owned a penny of investment in Muscle Shoals Theatres, have you?
A. No sir.
Q. You have had no place in the management and no control over the business, have you?
A. No sir.
Q. A Government Exhibit was shown to you this morning with some Fox deals on it, signed Crescent Amusement Company, with your name as an officer of the Crescent Amusement Company. You had no request from Muscle Shoals Theatres, or Mr. Rosenbaum, did you sign any such document?
A. No sir.
Q. You have no knowledge, have you, that Muscle Shoals Theatres or Mr. Rosenbaum knew that you were signing any such document?
A. No.
Q. The total management of Muscle Shoals Theatres, since August 1937 has been in Rosenbaum, has it not?
A. Yes sir.
Q. Your wife has never been active in that business?
A. No sir.
Q. Do you regard Mr. Rosenbaum as a competent manager?
A. I certainly do.
Q. Well, do you regard him as an expert?
A. Might good.

[fol. 2395] Q. You were asked this morning about a Metro deal, something about Muscle Shoals and something about Crescent. Was that for the year 1939, or 1938?

A. I don't know, I don't know what year it was.

Q. Mr. Rosenbaum was not present when you negotiated your contract with Metro, was he?

A. No.

Q. If Mr. Rosenbaum or Muscle Shoals Theatres had negotiated a contract with Metro, you were not present, were you?

A. No.

Q. It was not in any sense a joint deal, was it?

A. No sir.

Q. In the purchase of pictures over a period of these many years since 1925, isn't it true that there have been very few instances when you had any knowledge or any detailed knowledge of what Muscle Shoals Theatre was doing?

A. That is right.

Q. Muscle Shoals Theatre has had no knowledge or understanding of what Crescent was doing, except in some very rare instances?

A. No sir.

Redirect examination.

By Mr. Armistead, For Crescent:

Q. Mr. Sudekum, you were questioned about percentage pictures on cross examination, and I believe you stated that [fol. 2396] sometimes they were not advertised as widely as perhaps a flat rental picture would be advertised. I will ask you if the picture "Philadelphia Story" was not a percentage picture?

A. I think that was one of them.

Q. That is one you were questioned about this morning on direct examination, which was extensively advertised, is that correct?

A. Yes sir.

Q. Now, I will ask you also if you have not, from time to time, in practically every town in which Crescent had a theatre, heard rumors of opposition going to enter the town?

A. Numbers of times.

Q. Now, the situation at Dyersburg, I understood you to say that you had been endeavoring to find a location there for the purpose of constructing a theatre. How deep are those lots or is the average lot there in the business section of Dyersburg, approximately?

A. Well, around the square there, just about one hundred feet, maybe a little more.

Q. Well now, is a lot a hundred feet deep a good lot upon which to construct a theatre?

A. It would not be a good lot to construct a big nice theatre on.

Q. Is that what you contemplated erecting or constructing in Dyersburg?

[fol. 2397] A. Yes sir.

Q. Are you still hunting for a place?

A. Yes.

Q. Endeavoring to locate a place in Dyersburg?

A. Yes sir.

Q. Now, you were questioned about a theatre in Lebanon, Tennessee. I hand you here a picture of what purports to be a picture of the Princess Theatre at Lebanon, Tennessee, and ask you if that is a picture of that theatre?

A. Yes sir.

Q. Is that your large theatre there in Lebanon?

A. Yes sir.

Q. Practically, I mean, approximately what investment have you in that situation?

A. I would say fifty or sixty thousand dollars.

Q. Will you file that picture as Defendant's Exhibit No. 89?

A. I will.

(Picture marked Defendant's Exhibit No. 89)

Q. Let's get back to Dyersburg just a second. Is it hard to find or difficult to find a lot down there to locate a good theatre on?

A. Well, we have been on the lookout for one for the last two or three years, trying to find one, and have had the real estate people and different ones to try to help us locate one.

[fol. 2398] Q. What is the trouble?

A. Well, we just haven't been able to get a good location. I went down and looked at a garage, just off the Square, here some time ago. We looked at it but there was a filling station on one side of it and I didn't think it would be good.

Q. Why?

A. Well, it would be a little hazardous for people to pass in crossing in front of a filling station to come to the theatre. I didn't think that would be good. We just haven't been able to get one.

Q. You were questioned about a theatre at Murfreesboro, Tennessee, I will ask you if this is a picture of the Princess Theatre at Murfreesboro, Tennessee?

A. Yes sir.

Q. Will you file this as Defendant's Exhibit No. 90?

A. Yes.

Mr. Wright: If the Court please, I think it should be pointed out that those theatres that we were questioning him about in those towns were second houses. I don't see what these first run houses have to do with the ones cross-examined about.

Mr. Armistead: He has endeavored to show the bad, I want to show the good.

The Court: All right, go ahead.

[fol. 2399] By Mr. Armistead:

Q. What has Crescent invested in that situation, approximately?

A. I guess about $85,000 or $90,000.

Q. Now, when you were questioned this morning relative to the Cumberland purchasing a lot, endeavoring to purchase a lot in McMinnville, Tennessee did you have at that time a picture of that new theatre?

A. This morning?

Q. Yes sir.

A. It was in the office.

Q. Well, it was brought to the court during the morning, was it not?

A. Yes.

Q. I will ask you if this is a picture of the new Park Theatre that Cumberland constructed at McMinnville and if this little picture is a picture of the opposition house?

A. Yes sir.

Q. Will you file that large picture as Defendant's Exhibit No. 91 and the small one as Defendant's Exhibit No. 92?

A. Yes sir.

(Pictures so filed and marked)

Q. My attention has been called to the fact that on direct examination you—I should have asked the question and I would like the privilege of asking it at this time. It was an oversight on my part. Has the Crescent Amusement Company any understanding or agreement with any of the other defendant exhibitors to suppress competition?

[fol. 2400] A. None whatever.

Mr. Wright: That is objected to, if the Court please. That is the conclusion we are trying to arrive at in the suit and I don't think he is competent——

Mr. Armistead: I think it is competent to ask whether he has got any agreement, whether Crescent has with any of these other defendant exhibitors to suppress competition.

The Court: Well, that is a question that the Court will have to pass on or determine. Of course, there may be a difference between an agreement, working agreement or understanding and an explicit agreement. I think it is proper for you to ask him whether or not he has any specific agreement with any of the other officials of any of those affiliated companies. Even then it may not be necessary for a specific agreement to be had when the Crescent circuit is interested in the management of those companies.

Mr. Armistead: Well, I know ultimately——

The Court: He asked him, has he any agreement with any of the other exhibitors?

[fol. 2401] Mr. Armistead: Yes sir. That was my question, your Honor.

The Court: Go ahead.

Mr. Armistead:

Q. Did you?

A. No.

Q. Has the Crescent any agreement with any of the defendant exhibitors to keep the opposition or independents, so to speak, from obtaining pictures?

A. No.

By Mr. Raftery:

Q. Have you any such agreement with any distributor of motion pictures?

A. None whatever.

Q. Of either class?

A. No, no kind.

Recross-examination.

By Mr. Wright:

Just one more question.

Q. Did I understand you to state to Mr. Mitchell that the deal for the 1939-1940 Metro product was not discussed by you and Mr. Rosebaum and Mr. Stengel?

By Mr. Mitchell:

I object to the question.

By Mr. Wright:

Q. And the Metro representative?

[fol. 2402] Mr. Mitchell: I object because that is an incorrect representation of my inquiry. I asked if Rosenbaum was present when he made the deal with Metro and he said no. I asked if he was present when Mr. Rosenbaum made his deal with Metro and he said no. I asked him no question of the kind Mr. Wright asked him.

Mr. Wright: I will withdraw the question.

Q. When you told the Court you weren't present at the time the deal was made you mean you weren't present at the time that the contracts were signed, is that right?

A. Well, I don't remember Rosenbaum being there at all when that was made.

Q. Well, did you want to give the Court the impression by the answer that you and Rosenbaum and Stengel did not all participate in the negotiations?

By Mr. Armistead: Now I object to that form of cross-examination, that method of cross-examination—did you want to give the Court the impression. Let him ask what he did and what he said.

The Court: Well, that is the impression I got. The impression I got was that he did not participate in any way with either Mr. Stengell or Mr. Rosenbaum in the negotia-[fol. 2403] tions with Metro.

A. That is right.

Mr. Waller: That is about two different things. Mr. Wright asked him about the negotiations for the five year franchise and Mr. Mitchell was asking about the actual deal

that was made—two entirely different things that were asked about.

The Court: Well, what were you asking about, Mr. Wright?

Mr. Wright: That is all I had covered in my examination, just what Mr. Mitchell was trying to prove, was the proposed five year deal there that was discussed with Mr. Rosenbaum and Mr. Stengel and Mr. Sudekum, which was not made.

Mr. Mitchell: May it please the Court, I misunderstood Mr. Wright's evidence and he misunderstood mine. The testimony that I elicited from this witness was that Muscle Shoals Theatres bought their product and I judge from the testimony I heard this morning that Crescent had bought Metro product, and my information was, my information from the source where I get information is that neither one of them had anything to do with the other one's contract. I undertook to prove that by this witness and he said that was true.

By Mr. Wright:

Q. Let's see if this letter from Mr. Avey to Mr. Postman [fol. 2404] of February 16, 1940—I will ask you to read that first paragraph.

Mr. Waller: I think that is improper cross-examination, to ask the witness if a letter between two other parties refreshes his recollection.

Mr. Wright: Well, it refers to conversations with Mr. Sudekum.

Mr. Waller: It is improper to refresh his recollection by a letter he has never seen between two other parties.

Mr. Wright: He can't be refreshed until he sees it.

The Court: I don't know whether it will refresh him or not. I think he can ask him whether it does or not.

Mr. Waller: Well, that is just an indirect way of getting incompetent evidence into the record, your Honor.

(Witness read letter to himself.)

A. Well, there were several meetings there. I didn't read all the letter but there were several meetings there and this Mr. Avey was writing Mr. Postman here. Now, as far as I was concerned or whoever was there at the time, there was very little said about a five year franchise because

when that come up and them franchises come up, I asked about a five year franchise and he said three years, I believe, was the longest they could make it, and he kinder cut it [fol. 2405] pretty short. He says they wouldn't do it and couldn't do it.

Q. Well, after you read that you recall that negotiations were carried on with you and Mr. Rosenbaum and Mr. Stengel, don't you?

A. Well, he says here that negotiations were with Sudekum, Rosenbaum and Stengel but that could have been there at the office and I know nothing about that. He might have talked with me and all of them separate for all I know, but there was nothing much talked about a five year franchise.

Further this witness saith not.

[fol. 2406] T. J. Connors, called on behalf of Defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Waller:

Q. Are you connected with Loews, Incorporated?

A. Yes sir.

Q. In what capacity?

A. I am sales manager for the southern, eastern and Canadian sections of the country.

Q. Does that include the district where the Crescent Amusement Company and its affiliates operate?

A. Yes sir.

Q. In other words, the Atlanta and Memphis exchanges are both under you?

A. Atlanta is under me and Memphis was under me until the first of January.

Q. Of this year?

A. Of this year.

Q. How long have you known Mr. Sudekum?

A. Oh, I should say some eighteen or twenty years.

Q. Have you made deals with him on behalf of Loews, Incorporated?

A. I have.

Q. With the Crescent Amusement Company?

[fol. 2407] A. With the Crescent Amusement Company.

Q. Have you made deals for any of the other corporations such as Muscle Shoals—that is a partnership, I believe—Strand Enterprises?

A. Yes sir, with Mr. Rosenbaum.

Q. What about Strand Enterprises? Did you ever make any deals with Strand Enterprises?

A. I don't know just——

Q. The Haines circuit in West Tennessee?

A. No, I haven't.

Q. Have you ever had an instance where Mr. Sudekum threatened that if you did not give the Crescent Amusement Company product for a town where he had had opposition that he would not take your product in the other towns of his circuit?

A. I did not.

Mr. Wright: I want to object to this, if the Court please. Now, if he wants to go into what the negotiations were and have the witness say what was said on either side that is another matter but as to him putting words in his mouth here about whether there were any threats made or not, of course, that is pure conclusion.

Mr. Waller: It is negative.

The Court: I overrule the objection.

[fol. 2408] By Mr. Waller:

Q. Has Loews, Incorporated at any time since you have held the position with it that you testified about been obliged or coerced by the Crescent Amusement Company to discriminate against any independent exhibitor or any individual theatre owner?

A. It has not.

Mr. Wright: We make the same objection to that.

The Court: Sustained.

Mr. Wright: That is what we are trying to find out in the case.

The Court: Sustained.

By Mr. Waller:

Q. To your knowledge has there ever been since 1934 or any time prior to that any understanding or agreement be-

tween Loews, Incorporated and the Crescent Amusement Company or Mr. Sudekum or the other exhibitor defendants in this case that the competition of an independent exhibitor would be suppressed?

A. It has not.

Mr. Wright: We make the same objection to that, if the Court please.

[fol. 2409] By the Court: Overruled.

Mr. Wright: It is one of the issues in the case also.

By the Court: Overruled.

By Mr. Waller:

Q. Do you recall, Mr. Connors, whether or not the question of sale of product in Brownsville, Tennessee in 1935 came to your attention, as to whether this product would be sold to Mr. Lawing or to the Crescent Amusement Company?

A. It did.

Q. Did you have any recommendation from the branch manager at Memphis on that proposition?

A. Yes, there was a recommendation.

Q. Was that Mr. Willingham?

A. Mr. Willingham.

Q. What was Mr. Willingham's recommendation and what did you do with it?

A. Mr. Willingham recommended that we accept application of contract submitted by our Memphis branch from Mr. Lawing's theatre in Brownsville. I rejected the application.

Q. Did you determine that the product would be sold if satisfactory deal could be made to the Crescent Amusement Company?

A. I did.

[fol. 2410] Q. Does a branch manager, such as Mr. Willingham, have authority to make a contract?

A. He has authority to accept application of contract, not to make a contract or to confirm a contract.

Q. Why did you overrule Mr. Willingham on the Brownsville situation?

A. Well, as I recall the Brownsville situation, the reports that were sent to me by our branch manager disclosed that Mr. Lawing could not or would not give us a deal for as much revenue as we had formerly received from the

situation and that the application submitted was for less money than we felt our product was worth in the situation. I also had information that Mr. Lawing's theatre was a very small store type theatre having approximately a hundred and eighty seats and I knew from my experience in the picture business that a theatre with a hundred and eighty-three seats was old-fashioned and obsolete and sooner or later a new theatre would have to be built in the situation in order to give the people of Brownsville a proper home. When theatres are being built we receive from our salesmen information, as they constantly travel the territory and advise of new theatres, and knowing that a modern theatre was being built, I felt that we could secure in the way of revenue that which our product was worth and a great deal more than we had been receiving in Brownsville.

Q. Now, in 1937-1938 did the question come before you [fol. 2411] as to the sale of your product in Gallatin, Tennessee?

A. It did.

Q. Did you have a recommendation from the Atlanta branch on that proposition as to whether or not the product would be sold to Mr. Roth, the old account, or to the Crescent Amusement Company?

A. Yes, I did.

Q. Will you state what the recommendation was, and what your disposition of the matter was?

A. As I recall the Gallatin situation, Mr. Roth, couldn't buy what we term our output and I believe that Mr. Avey, our Atlanta branch manager informed me that he had visited Mr. Roth and had finally been unable to close or secure the type of deal that we felt that we were entitled to. On a subsequent visit to Mr. Roth he offered a split of the product because Mr. Roth had informed him that he couldn't use all of our product.

[fol. 2412] Q. Now, before that came up, let me ask you if you considered Mr. Roth a satisfactory account?

A. I did not.

Q. Why?

A. Because, in the trade paper, in a column published under the heading of "What the Pictures did for Me", exhibitors report to this trade paper results of pictures in their theater, and that column does have an influence with other exhibitors, and at the same time Mr. Roth deliber-

ately went out of his way to say mean things about our product.

Q. Now, notwithstanding that experience with Mr. Roth, you overruled the recommendation of your Atlanta Branch that the product be sold to the Crescent Amusement Company, is that correct?

A. That is correct.

Q. Now then, the product was subsequently sold to the Crescent Amusement Company, was it?

A. That is correct.

Q. Was that after you had information that Mr. Roth had declined to accept the product in January or February, 1938?

A. That is correct.

Q. In either of those situations, where you decided to [fol. 2413] sell the product to the Crescent Amusement Company, were you influenced by the size of the Sudekum circuit, or did you decide those matters on their own bases?

A. Those matters were decided on their own bases.

Q. With reference to the ability of the Crescent Amusement Company and its affiliates to compel or coerce Loews, Incorporated, to discriminate against individual theater owners, may I ask you how important these defendant exhibitors are to Loews, Incorporated, how important their business is as compared to the total business of your concern?

A. Why, the business we secure from all of the Sudekum Theaters is comparatively small in dollars and cents.

Mr. Wright: If your Honor please, that is literally immaterial; the only issue here is how much is the business he gets from Crescent in comparison to the available opposition, because we are not trying the case on the basis of what is available throughout the country. We are limited to the situation in which Mr. Sudekum operates.

The Court: Sustained.

Mr. Waller: Your Honor, I think that is pertinent to show——

[fol. 2414] The Court: Well, this is not a question of Crescent competition with some other circuits.

Mr. Waller: No, I don't think your Honor understood the purport of what I wanted to show; what I wanted to show is that these affiliated circuits are not so important to Loews that Loews, in order to get that amount of busi-

ness, discriminated against individual theater owners in the exercise of——

The Court: The question is whether or not they are larger than what they got from individual theater owners.

Mr. Waller: The policy is, the business policy is, they undertake to select their customers; they have certain criteria that they follow. Now, would they in a situation of this kind depart from its established practices on account of revenue they would get?

The Court: Well, I know the primary purpose of distributor companies is to sell their pictures; otherwise they could not exist.

Mr. Waller: Could we offer that proof, your Honor?

[fol. 2415] The Court: Yes, I will hear it all.

Mr. Waller:

Q. Mr. Connors, will you state whether or not the business of the Crescent Amusement Company and these affiliates is of sufficient importance to Loews, Incorporated, to cause it to depart from the customary business practices?

A. It is not.

Mr. Wright: I object to that.

The Court: I am sustaining the objection; but he is making offers for the record.

Mr. Waller:

Q. What would you have to say as to the importance of the Sudekum business, including the affiliated circuits, as compared with the film rentals throughout the United States and Canada?

Mr. Wright: That is objectionable; it is all immaterial.

Mr. Waller: That is but a part of the offer.

The Court: He has not answered that question.

[fol. 2416] A. Well, the revenue we receive from Sudekum and affiliated circuits is comparatively small, as compared with our national gross, and I would say that it was—Well, they gave us less than a hundred thousand dollars, and we do approximately fifty million dollars a year in film rentals in the United States.

Q. Take, for instance, the Music Hall in New York, how would that compare?

A. Well, we receive from one film rental in the Music Hall in New York City more than we do from all the Sudekum and affiliated theaters for an entire season.

Mr. Waller: That is the end of the offer of proof, your Honor, but I would like to ask one other question:

Q. What is the practice and policy of Loews with reference to second run product in a town where you have an established first run customer; that is to say, is it your practice to sell second run to that customer if he has a second run theater, or to his competitor?

A. Where our first run account operates a second run, we prefer to have our second run pictures shown by the first run account.

Q. For what reason?

[fol. 2417] A. For the reason that he is interested in maintaining a policy that will not affect the first run theater; he is a man that usually has substantial investments in the first run theater, and he will not do anything that will be detrimental to the first run; and the first run is the theater which gives us the great revenue which we want to protect.

(Short recess).

(Resumption after short recess):

Mr. Waller: Your Honor, in putting Mr. Connors on the stand we are not waiving our right to make a motion at the end of the Government's proof in this case.

The Court: All right.

Cross-examination.

By Mr. Wright, for the Plaintiff:

Q. Mr. Connors, I believe you testified on direct examination that you overruled this recommendation to sell this Crescent circuit, and then you later decided to sell them anyway, in March, is that correct?

A. I don't quite understand the question; are you talking about the entire Crescent deal, or the particular situation?

Q. Well, when was it that the Crescent deal for the 1937-[fol. 2418] 1938 product was first brought to your attention?

A. The 1937-1938?

Q. Yes?

A. Well, we probably started negotiating with Mr. Sudekum in the summer of 1937.

Q. In the summer of 1937; and negotiations were continued from then right on up to the time the contract was signed?

A. That is the general practice with every man that you do business with.

Q. Well, I am talking now specifically with reference to your deal with Crescent for the 1937-1938 product?

A. That was started sometime in the summer of 1937, when the negotiations were started.

Q. That is when it first came to your attention?

A. I probably came down here and talked to Mr. Sudekum myself.

Q. And in connection with negotiating the deal, there was something said about including the new town of Gallatin that Mr. Sudekum had just moved into, isn't that a fact?

A. Not at that time.

[fol. 2419] Q. Why not?

A. Well usually in negotiating a deal we agree upon basic principles, and after you agree upon basic principles, you then get down to the individual situation.

Q. Do you remember what the basic principle of this deal was?

A. I believe I do.

Q. What was it?

A. I believe that year our policy called for four pictures at forty percent, eight pictures at thirty-five per cent, or if the situation was on in which we felt we were in better position, we had better play on a flat rental, instead of the percentage, eight pictures, or what we believed would be thirty-five per cent.

Q. Are you referring to a national policy, or the particular deal you negotiated with the Crescent Amusement Company?

A. Our national policy applies to circuits and independents, so that either way we were negotiating, we were negotiating on the basis of our policy.

Q. There are variations, are there not between negotiations you have with one circuit and with another circuit, or with one exhibitor or another exhibtor?

A. As to terms, not a great many, very few.

Q. What I am tryng to get at is the particular negotiations that you had with the Crescent Company for the [fol. 2420] 1937-38 contrac- product?

A. Yes.

Q. You recall whether those—do you recall those?

A. I have a recollection of them, yes.

Q. May be I can refresh your recollection of the basic principles that you went by by calling your attention to a letter that is here, in which Mr. Avey inquires of Mr. Sudekum. This letter is dated November 10, 1937, addressed to Mr. Sudekum. The letter says:

> "Attached to these contracts you will find a list showing the total amount you paid us for the features last year, and you will see the grand total for the 1937-38 product. In other words, the product for the 1937-38 season is set up on exactly the total in dollars and cents that we had last year, with the exception of a few minor pennies where I gave you the benefit of the odd cents.
>
> "Gallatin, of course being added, increases the amount for the total of the sale in Gallatin, and I would appreciate very much your signing the contracts as quickly as possible and returning them to me."

A. It shows in 1937-8 and 1936-7 we had the same basic policy.

Q. Yes, but the deal was set out on the basis of what [fol. 2421] you had received the previous year, plus what you were going to receive after the new theater at Gallatin was in, is that right?

A. That is what you read.

Q. And that deal was brought to your attention on that basis, prior to the time this letter was written, was it not?

A. Yes.

Q. Then you say that, I believe you said this morning that after the contracts for the circuit were submitted by Mr. Kessnich in December of 1937, you decided to disapprove them?

A. I didn't testify this morning.

Q. Beg your pardon, on your direct testimony?

A. I do not recall that.

Q. You recall when the complaint of Mr. Roth had made about your selling away of the 1937-8 product from him,

without giving him a chance to make an offer, was brought to your attention?

A. I do.

Q. When was the first time that was brought to your attention?

A. The exact date I do not remember.

Q. Do you remember about when it was?

A. I believe it was some time in the fall of 1937.

Q. And that it was not until after you received that [fol. 2422] complaint, was it, that you decided that it might be advisable to hold up the Sudekum deal, is that correct?

A. We did not hold up the Sudekum deal.

Q. Well, when was the final approval of the contracts?

A. I understand they went ahead and played the pictures, a little ahead of the approval of the contracts.

Q. Well in any event, he played the pictures for four months before the contracts were approved?; you are aware of that, are you not?

A. Are you tal-ing about all of the Sudekum towns or what towns?

Q. I am talking about the 1937-38 product in Mr. Sudekum's house in Gallatin.

A. I believe there were some spot pictures in Gallatin.

Q. But Gallatin was negotiated as part of the Sudekum circuit.

A. It was.

Q. Now when did you first learn of the letter which had been received from the department of justice, with reference to the Gallatin sell-way?

A. As soon as the department of justice letter was received by our legal department, it was referred to me.

Q. Did you discuss that letter with the legal department?

A. I did.

[fol. 2423] Q. And then it was after that discussion, wasn't it, that you decided to send Mr. Avey back into Gallatin, to offer a split deal of your 1937-8 product; is that correct?

A. I do not believe that is so. It is our custom to refrain from selling product to a different theater than has enjoyed our product, without the approval of a sales manager, and when a contract is received in our home office for a theatre other than the one that has been our regular account, the contract is specifically called to the sales manager's atten-

tion, and we investigate it and learn why the contract is not signed by somebody to the old account. Our product is the most valuable on the market and we believe that it is good business policy for us to continue to do business with existing accounts, if this is possible.

Q. At the time you were negotiating the deal for the Crescent Circuit, in the summer and fall of 1937, you knew, didn't you, that you had not received any offer from Mr. Roth at that time?

A. I did not know that.

Q. Isn't it your business as salesmanager, if you are going to carry out this policy of offering pictures to old customers to know who they are and know whether the product is being offered to them or not?

(Question read.)

A. Yes, and I supervise the distribution of product to [fol. 2424] about seven thousand theatres, probably seventy-five hundred, and I can not have at my finger tips an intimate knowledge of every one of those theatres, that is why I stated when a contract was submitted for a theatre that is in opposition to an old account, it is called to my attention.

Q. You seem to be very familiar with the deal that was made with respect to Brownsville, a much smaller town than Gallatin, about three years difference, just what was the information that you had of the difference at Brownsville, with respect to Brownsville?

Q. As to the principle?

A. Yes, what information did you have?

A. I read in one of the trade papers about your proceedings down here, and when Brownsville was mentioned, and Mr. Willingham's letter was published, in that, I checked back on our record.

Q. You decided in the Gallatin situation that you had done the wrong thing in not offering your product to Mr. Roth, before you had offered it to Mr. Sudekum, isn't that right?

A. That is true.

[fol. 2425] Q. Insofar as any custom you had is concerned, you also violated it when you refrained from offering the product in Brownsville before making a deal with Mr. Sudekum, isn't that correct?

A. I don't believe so.

Q. Explain the difference between the two situations?

A. The difference is this, that if a man can't keep abreast of the time and develop his theatre so that it is modern and offers us either the best outlet for our product, or one that is comparable, we cannot continue to supply our product to an inferior theatre. A theatre with 183 seats is an inferior theatre.

Q. Mr. Roth's theatre was also inferior to Mr. Sudekum's theatre in Gallatin, isn't that a fact?

A. I am not as familiar with the difference in the theatres in Gallatin as in Brownsville. However, we did offer Mr. Roth our product. Mr. Roth stated that he couldn't use all of our product and offered to use a part of it. And because he offered to use a part of the product he was offered a split of the product. In fact a contract or an application was submitted to him at the price he offered and he refused to sign the contract.

Q. Just one moment. All these statements you have just been making are based on what somebody else said, it is in the record?

[fol. 2426] A. It is in the record, yes, it came to me as Sales Manager.

Q. You, yourself, never offered Mr. Roth anything, did you?

A. No. I instructed the Branch to offer it.

Q. Now, I believe that you testified here to the size of amount of business that Crescent gives you each year?

A. I did.

Q. Do you recall about how the amount of the Crescent business that you got for the 1937-1938 feature product compares with what Mr. Roth was offering at Gallatin?

A. Oh, approximately 2 per cent, I would say.

Q. That was the amount Mr. Roth was offering, you say, about 2 per cent of the Sudekum deal?

A. That is approximately it, that is, for the whole Sudekum circuit.

Q. What are you referring to as the whole Sudekum circuit?

A. The total amount of revenue we secure from the Sudekum circuit and what we term affiliated circuits. You are not comparing Sudekum's amount from Gallatin as against Mr. Roth's revenue from Gallatin, as I understood your question?

Q. That is right.

Mr. Waller: That would be a matter of computation I think, about two per cent; it may be right, it may be wrong.

The Court: It may be, I don't know. He is just giving [fol. 2427] his best estimate.

Mr. Wright:

Q. These negotiations that you have with Mr. Sudekum for his circuit and affiliates go on every year and last anywhere from six months to a year and a half, or more, don't they?

A. No, our season runs just for a year.

Q. Yes, but your negotiations for the 1939-1940 season product for example, continued on into the 1940-1941 season, isn't that right?

A. No, that is not right. Our negotiations for the 1939-1940 product continued for many months and when we couldn't get a meeting of the minds, the negotiations terminated.

Q. Then they were renewed again?

A. Yes, then when we were negotiating for the 1940-1941 product, then we attempted to salvage as much as we could from the 1939-1940 product.

Q. Why do you speak of that as salvage?

A. Well, as long as a picture isn't played in a situation, there is still a possibility of securing revenue from that picture, from that situation.

Q. But you hadn't offered those pictures to Mr. Sudekum's opposition, had you?

A. When we couldn't do business with Sudekum, we offered those pictures to every place that we thought we could sell them.

[fol. 2428] Q. Did you offer them to the Exhibitor at Gadsden, Alabama, East Gadsden?

A. If you are going to ask me about specific towns, I don't believe I can tell you, but I can tell you that my instructions were to sell every possible outlet.

Q. Have you got any copies of those instructions?

A. I imagine there must be some in our files somewhere.

Q. Do you suppose you could find them for us?

A. We could look.

Q. They were written instructions?

A. Well, I am not sure whether they were written or not, because, as I recall, I came to Nashville for the final attempt to conclude a deal with Mr. Sudekum. We were unable to have a meeting of the minds at that time and it was determined that we were going to do everything possible to sell our product. I believe I, personally, issued instructions to our Branch Managers and to our salesmen, because upon leaving Mr. Sudekum's office we made plans to try to sell our product and went over the territory.

Q. Just when was this that you had the final failure of meeting of the minds on the 1938-1939 product?

A. The axact date I do not recall.

Q. It was well along into the year 1939?

A. It was probably in the winter, say.

Q. It was later than that, wasn't it?

[fol. 2429] A. I don't recall that it was any later than that.

Q. Well, in any event, you don't offer any of your pictures to anyone else while you are negotiating with Sudekum, is that right.

A. I don't believe it is a fair trade practice.

Q. No matter how long the negotiations may take?

A. If we believe we are going to make a deal.

Q. You always believe you are going to make a deal with Mr. Sudekum some time in the future?

A. Not by past experience we don't. Mr. Sudekum was a man who bought our product, but not every season.

Q. Well, you also had some negotiations with reference to a five-year deal, did you not, in connection with the 1938-1939 and 1940-1941 product?

A. We did.

Q. Those were carried at the same time?

A. They were carried on towards the end of the negotiations.

Q. Are they still going on?

A. I didn't understand the question?

Q. Are they still going on?

A. I still don't understand you?

Q. Have you terminated those negotiations for the five-year deal?

A. We have a consent decree.

[fol. 2430] Q. Just answer the question?

A. Certainly not.

Q. You have not?

A. We have not continued.

Q. Are you sure you understand the question? The question was, have you terminated the negotiations?

A. If I understand the meaning of the word, you are asking me, did we stop negotiating a five-year deal?

Q. Yes.

A. We did and refused to give Mr. Sudekum a five-year deal.

Q. When did you finally reach that result?

A. I believe early in 1940?

Q. I think you testified on your direct examination that ordinarily you liked to have your first run customers play any second run that you might license so that the first run revenue would be protected, is that right?

A. That is right.

Q. I believe you limited that to the situation where the customers was operating both the first and second run theatre?

A. That is right.

Q. Did you have any discussion with Mr. Sudekum at the time you were having negotiations for a franchise, with respect to a second run option?

A. Where?

Q. In his circuit?

[fol. 2431] A. We never grant options. If you are talking about Nashville we have consistently refused to sell Sudekum second or subsequent run in the City of Nashville.

Q. I am not talking about Nashville, I am talking about the circuit?

A. If we were negotiating a deal with Sudekum, we would negotiate for every run that we thought we could sell him.

Q. Why is it that you never grant options?

A. Because that has been our policy. What do you mean by options? Maybe I misunderstand your question?

Q. Playing second run if the exhibitor so desires?

A. To my knowledge we have never made any such deal.

Q. Do you know why that is?

A. Well, first, I would, as Sales Manager, wouldn't see that it would be good business to give options. We want to make direct sales.

Q. I think you testified on direct examination that your decisions as to whether or not to license films to a particular

account was not influenced by the size of a circuit that might be involved?

A. That is true.

Q. In every situation where you have a small account in opposition to a circuit, it is a fact, is it not, that you [fol. 2432] consider what the effect of licensing that small account would be upon your deal with the circuit?

A. That is not so.

Q. So that, if it appeared that by licensing an account which paid you a thousand dollars, you would lose twenty thousand dollars worth of revenue, you would go ahead and license the one thousand dollar account, anyway?

A. If we felt that that account should play our pictures, yes, we would.

Q. What would give you that feeling?

A. Well, the fact that we distribute Metro-Goldwyn-Mayer pictures, the best pictures on the market.

The Court: I sustain the objection.

Mr. Wright:

Q. Metro-Goldwyn-Mayer Pictures is not a charitable institution, is it?

A. It is not.

Q. It is run——

A. To make money.

Q. To make money?

A. Yes, sir.

Q. I take it, in licensing films, your decisions are guided by what decisions will make you the most money?

A. That is true.

[fol. 2433] Q. And that would apply to any deal you made in Brownsville or Gallatin, Tennessee, as well as anywhere else in the country, is that right?

A. It would. The quickest way I know not to make a profit is to permit dictation.

Q. I didn't hear the last sentence?

A. I say, the quickest way I know not to make profitable deals, is to permit dictation.

Q. That depends on how profitable it is to be dictated to, doesn't it?

A. It may be profitable for one season, and then you pay the penalty for many seasons after.

[fol. 2434] Redirect examination.

By Mr. Waller:

Q. Mr. Connors, in other words, you do business for the long pull rather than the short pull?

A. Absolutely.

Q. You say precedents in your business are very important?

A. Very important.

Q. In other words, if you sell Mr. Sudekum at bargain prices one year he would hold it against you the next year?

A. He definitely would, or attempt to.

Q. Mr. Wright asked you about the time when the Gallatin deal arose, when the Crescent deal involving Gallatin was first called to your attention. I will show you one of the Government's exhibits, which is a letter from Mr. Postman to Mr. Kessnich, dated December 21, 1937, written at your suggestion, as the letter states, and in which reference is made to the Gallatin situation. Will you read what is stated there about the time when the Gallatin situation was called to your attention?

A. This letter is dated December 21, 1937 and it is addressed to Mr. Kessnich.

"Dear Mr. Kessnich:

We received the Sudekum contracts yesterday and approved all of them with the exception of the Roxy Theatre at Gallatin, Tenn. According to our records, we have sold the New Palace Theatre in this situation [fol. 2435] for many years and neither Mr. Connors nor the writer recall your having mentioned this when we discussed the Sudekum deal generally."

Q. Now, that is enough. Is that correct, that you didn't recall prior to receiving his contracts the day before that letter was written that the Gallatin theatre was included in the deal?

A. That is true.

Cross-examination.

By Mr. Frolich:

Q. Mr. Connors, how long have you been in the motion picture business?

A. About twenty six or seven years.

Q. And you are fairly familiar with the product of the various picture companies?

A. I am.

Q. Now, are you familiar with the pictures that have been put out for the last fifteen or sixteen years by the Columbia Pictures Corporation?

A. I am. Fifteen or sixteen years? I don't know about the fifteen or sixteen years, but I am generally familiar with the Columbia.

Q. Didn't you know Columbia has been in business since 1924?

A. Well, I wouldn't remember when they came into business.

[fol. 2436] Q. But you are familiar generally with the product?

A. I am.

Q. You know that Columbia's product is more or less a program picture product, isn't it.

A. No, they have some very fine pictures.

Q. You would not say that of the fifty pictures that we make a year there are more than three or four that rank with Metro's A pictures?

A. That is true.

Q. About three or four of Columbia would be equivalent to eight pictures of Metro?

A. Yes, sir.

Q. So that Columbia, in selling its pictures to the exhibitors, from your experience would — in somewhat a different position then to Metro in selling pictures?

A. Yes, that is true.

Q. Columbia would probably find it more difficult to sell an exhibitor than Metro would find it?

A. I believe that would be true.

Further this witness saith not.

[fol. 2437] Oscar Morgan, Being Recalled for further Cross-Examination by Defendants, he having been previously duly sworn, testified as follows:

By Mr. Waller, for Defendants:

Q. Mr. Morgan, you have previously testified pursuant to a subpoena of the Government in this case, have you not?

A. Yes, sir, I have.

Q. When did you go to Atlanta as District Manager for Paramount?

A. I went down there in November of 1932, and then returned to New York and took over active control of the district January 1, 1933.

Q. At the time you took over that office, what is your information as to the history of Paramount's dealings with the Crescent Amusement Company?

A. Well, we had been dealing with Crescent——

Mr. Wright: If the Court please, I don't quite see what a recital of the history here by Mr. Morgan would be proper. I think the history should be shown by whoever made it. May I ask what you are attempting to show?

Mr. Waller: Well, I will develop it another way. I am [fol. 2438] trying to show the information he had when he came there, whether Crescent and Paramount were dealing with each other for many years and the reasons for it.

The Court: Let him answer.

Mr. Waller:

Q. Will you answer the question?

A. As I say, we had been dealing with Crescent for a good many years, I think since they were in business; and when I came to Atlanta I found the Paramount pictures were not being shown in the Crescent circuit; and, naturally, in my position, I wanted to find out why.

Q. Well, did you undertake to make the deals with the Crescent Company after you became District Manager?

A. Yes, sir, I did.

Q. Did you have success in that?

A. No, I didn't. Crescent offered us propositions which were entirely too low and which we couldn't accept.

Q. Did that happen for one season, or more than one season?

A. Well, it happened, I think for that one season; as I say, we were already out and the season was over half gone, that particular season. So I started negotiations on the next year's product.

[fol. 2439] Q. What year's product was that?

A. That was 1933-34, and we just couldn't make a deal.

The Court: Well, the first season was?

A. 1932-33.

Q. 1932-33?

A. Yes, sir, that starts in August or September, as a rule—the season.

Mr. Waller:

Q. Now, what about the next year's product, Mr. Morgan?

A. 1933-34, you mean?

Q. Well, you said you didn't make a deal for 1933-34?

A. No, we couldn't make a deal. We couldn't make a deal for 1934-35, that following year.

Q. Now, did you make any inquiry from Mr. Sudekum as to why he was offering such low rentals, as you regarded them?

A. Yes, I did. I had several talks with Mr. Sudekum, and having known him for a good many years, felt there was something wrong; and I don't remember the exact date but he finally told me he had a grievance against the company; and that he didn't feel that he was going to try very hard to get together with us until those grievances were removed.

Q. Did you inquire of him as to what those grievances were?

A. Yes, sir, I did.

[fol. 2440] Q. Did it have reference to the position of the Paramount Theater in Nashville?

A. Yes, sir.

Q. Well, what did he say about that?

A. He said Paramount came into Nashville and built a theater, which was all right as far as he was concerned, and we operated it ourselves, and that he had gone to New York and talked to the people in our department, and they told him that as long as we operated it ourselves that it was their policy, and that they were doing it all over the country; but that if they ever gave up the theater to some one else they would first negotiate with him. When he made that trip to New York, Paramount had turned the theater over to one of Paramount's partners in the South.

Q. Was that a man by the name of Wilby?

A. Wilby, yes, sir.

Q. Well, when you got that information, did you tell Mr. Sudekum you were trying to work it out?

A. Well, I told him I knew nothing about it. And he was very emphatic that they had made this promise.

Q. Did you try to make a deal?

A. Yes, I tried to make a deal; he was willing to buy the pictures at his terms, but those terms were entirely too low for us to deal.

[fol. 2441] Q. Now were you able to make a deal for the 1935-36 product?

A. I will have to refer to those seasons again, if you don't mind. (Refers to memorandum). Yes, I was able to make a deal with him on S-7, that was 1935-36, that was the season.

Q. Was that the occasion or the season which followed this conversation you had had with Mr. Sudekum?

A. No, there was one season before that I believe, we still could not get together, he just took the attitude that until such time as something was done by us to do something about the promise regarding the theatre that he was not going to trade with us, getting along on a deal, he always offered prices to us that were entirely out of reason.

Q. About the 1935-36 deal you made, how did that come about?

A. For about two years I believe I had been corresponding with New York, about a year and a half I believe it was, trying to get some action on this theatre proposition, and all the people that had been in the theatre department at the time Mr. Sudekum had proposed that, had left the company and it was very difficult for any one in New York to give me a decision. Mr. Frank Freeman had come in and was acting as the new head of the theatre department, and he knew nothing about it, and they were making an investi-

[fol. 2442] gation to see what they could find out regarding these promises, and in all that period of time they stated they were giving consideration to this matter, that was the answer I would get from them, and finally I told Mr. Sudekum that it would help matters a little more if he would make a deal with us, of course on terms that were fair, and I did make out a three year deal with him, eventually for three years, and finally Mr. Sudekum said he would make a deal but he would only agree to make a one year deal, because he wanted this other proposition settled.

Q. Was it in your proposition for Paramount to make a deal for more than one year? Was that unusual?

A. No, it was not a bit unusual.

Q. You did try to make a three year deal at that time, but were not successful?

A. Yes, I did.

Q. You made a one year deal?

A. Yes.

Q. Did you thereupon enter into a one year deal, when was that one year deal negotiated?

A. The deal was negotiated in the spring, early in the spring.

Q. Of 1935?

A. In 1935, that is right, in 1935, and I think the con- [fol. 2443] tracts were eventually signed, sealed and delivered in August of 1935.

Q. By the time that season was concluded, had the Paramount theatre matter been worked out?

A. No, it had not.

Q. Did you make a deal for the next year with Mr. Sudekum?

A. No, the home office still advised me they were considering the matter, a great deal of correspondence passed back and forth on it and when we got towards the end of the S-7 the 1935-36 season, Mr. Sudekum stated that he just would not negotiate on the following year's product until this matter was definitely settled.

Q. Then you did not have a deal for 1936-37?

A. No, we did not have a deal for the 1936-37 season.

Q. Now during that season, or toward the end of that season, was this Paramount theatre matter worked out?

A. Yes, that Paramount theatre matter was worked, I don't know the exact date, but it was worked out prior to the 1936-1937 season—no, during that season. Some time during that season.

Q. That was on the basis of leasing of the theatre?

A. Yes, sir.

Q. A lease by Paramount to Crescent?

A. That is right.

[fol. 2444] Q. And when those negotiations for the lease were going on, did you also negotiate then for the product?

A. Yes, I negotiated—I understood they were willing to negotiate for the theatre on a three year lease.

Q. You mean Paramount?

A. Paramount, with Mr. Sudekum, and we started negotiations with him on a three year film contract, which was to start with the season of 1936-37, S-8, which was supposed to start with that season, but Mr. Sudekum and the theatre

department just could not get together on terms for the theatre and he would not conclude a film deal until the theatre proposition was signed up and settled.

Q. Why was it you were trying to negotiate a three year deal?

A. Well in the first place it was natural for me, representing the Company to want the film deal to run the same length of time or the same terms as the theatre lease, because otherwise we would be in this position, that he would have to play the theatre in Nashville as first run, a first run theatre, and a contract for the pictures, and we would be out of the rest of his circuit for the remaining two years.

Q. What finally happened about the term of the leasing of the theatre?

[fol. 2445] A. After we had pretty well settled our terms on the three year deal, I discovered that they were negotiating on a five year lease for the theatre, and I immediately advised New York that I wanted the opportunity of changing the Sudekum deal to a five year deal.

Q. Just a moment there, did you get that adjusted?

A. After considerable correspondence they finally said that they were going to get together and negotiate on the five year business, and advised Mr. Sudekum, and he finally agreed.

Q. Did you finally negotiate the deal for a five year term?

A. Yes, sir.

Q. Was it an easy, short matter, or did it require some time and trouble to consummate it?

A. Well I have made a lot of deals for this company, but I think that was the most difficult one that I ever had to make.

Q. You mean the terms?

A. Terms and bickering months and months that were used up in the negotiations, fighting over every word of the way, every paragraph and every dollar.

Q. Mr. Morgan, you stated it was not an unusual thing for your company to make deals for more than one year; will you state some of the advantages to a distributor, of course I mean, from your standpoint in your connection with the [fol. 2446] Paramount, in long term deals or deals for more than one year?

A. Well this business, as has probably been brought out in this case, is a horse-trading business. There are no

set prices like there are for other commodities, and it is strictly a competitive business. Theatres usually make two or three changes a week, as many of them do, and fewer changes, they can easily afford if they want to deal with one distributor, and many are distributed in any one season, and it causes the distributor to have a continuous flow of the product in those towns, and a continuing revenue and an outlet through the length of the contract, and for the product, of course.

Q. Is the production of pictures and the marketing of pictures a risky business?

A. Yes, it is, it is an extremely highly perishable business.

Q. Can you tell when you make the picture whether the picture is going to be a box office attraction or not?

A. We feel we can some, but the man does not like that, and the making of the contract, we feel we can sell to a man, and the making and coming out of the pictures, and we know what our investments are, the pictures have cost us so much.

Q. In addition to the security that a distributor gets, [fol. 2447] or partial security that he gets from knowing he has a deal made for his pictures over a period of years, what do you say about the advantage of not having to negotiate annually for deals; is that an advantage or not?

A. Oh yes, it is a distinct advantage during the selling season, as a general rule prior to this decree, was a fairly short period of time, about three months, and in that three months the men are required to sell a great number of contracts, and to use the vernacular, to be up to their eyes, and naturally it is better for the man not to be going through those negotiations every year, and it saves a lot of expense.

Q. You said there was a good deal of negotiation in regard to this five year franchise; I will ask you, Mr. Morgan, whether Mr. Sudekum got the terms that he first offered on that franchise?

A. No, sir, he did not, by no manner of means.

Q. He did not coerce you to take your proposition?

A. No, sir.

Mr. Wright: I object to that, he might ask leading questions all right, but when it comes down to the issues in the case, I think the witness should be permitted to testify.

[fol. 2448] Mr. Waller: Well that was just a little side remark of mine.

The Court: Yes.

Mr. Waller:

Q. Well what about the figures and how much was the film rental that was actually called for in the franchises as compared with what Mr. Sudekum offered?

A. Well I will use percentages, the deal for the first year was about fifty per cent more than Mr. Sudekum offered for the franchise, it provided for an annual step up of rentals.

Q. This franchise provided for annual step up of film rentals?

A. Yes, sir, and that provided for a percentage of increase, cumulative for each of the remaining four years, the first year of course being already set.

Q. Aside from the normal advantages of having a long term deal, which you have already mentioned, would you say there was an additional advantage to the film man, where there is a step up?

A. Yes, sir, it is for this is for the cumulative step-up, there would be an advantage in increased revenue of course in making a franchise, or what many people call a franchise, [fol. 2449] for one, two or three or four or five years, a one, two, three, four, or five year deal. Each year this annual thing of horse trading business, like ours, and ask for higher terms, better terms, because we feel that we learn more about the business, we are able to make better pictures, fit the public taste better, and play to more people, and naturally that is the ambition of every producer and at that you are involved in a greatly increased cost each year in addition to the normal increase in cost of star players, prices of plays and books, etc., that is set up each year. You asked me about this increase; that increase serves to protect you from these other things that we have to contend with, and have been happening year in and year out, in business increased costs.

Q. Is that a business that is affected by the business changes, that is the booms and depressions or other economic conditions, generally?

A. Oh yes, sir, it is decidedly so.

Q. If a depression should occur during a long term deal like this, suppose a long term deal like this is made, would

that mean or not you had passed on a considerable part of that risk to the exhibitor?

[fol. 2450] A. Yes, sir.

The Court: What if a boom should occur?

Mr. Waller: The five per cent takes care of that.

A. And the percentage pictures you have.

[fol. 2451] Q. Now, you said that you got considerably more than Mr. Sudekum offered for each of the years for film rentals of this franchise. How did you go about figuring up what you thought you were entitled to?

A. Of course, I had had a lot of experience in the South and we have our own records back over a period of many years, as I stated before, in making a deal, you take into consideration all of those factors, your own personal knowledge, the advantage of the knowledge of your own men and the records that you have over a period of years and we approach it——

Q. What I mean is, did you do it town by town?

A. As I was going to say, that is the only way you could approach a problem like that, you would have to pick out each town and figure it on what you thought your pictures were worth in that town and that is the way that was figured.

Q. You would add those up?

A. You always, it is customary to take the total to see how it compares with the total you have gotten out of them before.

Q. Is it one of the purposes of a franchise of this character, Mr. Morgan, to prevent the so-called independent exhibitors from getting pictures?

A. No, decidedly no.

Mr. Wright: That is objected to; that is what the Court has to decide.

[fol. 2452] The Court: Yes.

Mr. Waller: I asked, from his standpoint; that is one of the issues and I am entitled to ask it as a representative of Paramount.

The Court: Well, I sustain the objection.

Mr. Waller:

Q. Mr. Morgan, you were asked when you were on the stand before about this clause 8-e in the franchise, the re-

peat run clause, and about the modification of that clause. What were the reasons for the modification, from the standpoint of Paramount?

A. Well, I gave the reasons the last time I was on the stand, that the reason for the modification was because Mr. Unger had discovered that there was no time limitation in that clause and it came about through a letter or correspondence that passed regarding the Tim Smith matter, and Mr. Unger wrote back, and I think that letter was stipulated, that the clause was not a good clause for us and should be modified, limiting the time within which he could select those pictures and play them.

Q. Now, regardless of any correspondence that might have taken place, what I am asking you is whether or not you, and the other representatives of Paramount, thought that there would be some advantage to Paramount from a modification of that clause, and state what the advantage was?

A. Definitely so. The advantage to us was that we would [fol. 2453] know they would have to select those repeats within a limited time and they would be in position to supply our prints. Otherwise, he would have an unlimited time in which to select the pictures and place us in a position that we would have to keep prints in the exchanges for those pictures an unlimited time, or forever.

Q. Was that the reason for the modification?

A. The reason for the modification was that it definitely protects us and puts the exhibitor in the position where he had to make his selection definite so that we would not, so that we would be able to supply all those pictures, and also the fact, if he did not make the selection, we would not be under any obligation to supply them.

Q. Did this modification, which was made, free the Paramount from any restriction in selling other deals of second run to independents?

A. No.

Mr. Wright: That is a pure conclusion; he can't testify what the conclusion was.

The Court: That is a question of the construction of the contract. Of course, it would free them in selling second run deals as to any pictures which had been refused by the exhibitors.

Mr. Waller: That is what I am trying to get at. The Government has listed this clause——

[fol. 2454] Mr. Wright: This question is not only a question to construe it, but he is asking him to contradict the clause itself. Obviously, on its face, it prevents any other exhibitor from buying the repeat pictures until Sudekum has decided whether he wants to run it again.

The Court: That is not the question. The question was, would it free any of those films for second run? It seems to me, from a construction of the contract, that it would free those films which Sudekum had decided he was not going to play.

Mr. Waller: Your Honor has got that impression from statements of Counsel for the Government. In other words, I don't think the clause has anything to do with allowing second run deals, as originally drawn or as modified; Paramount was perfectly free to sell second run pictures to anybody that wanted them, regardless of whether Crescent wanted the pictures or didn't want them.

The Court: If it is a question of construction of the contract, it is not for this witness to say.

Mr. Waller: They have introduced letters as trying to [fol. 2455] construe and as putting that construction on it.

The Court: That is just their construction, their idea of the construction that could be placed on it. You have got your idea, a different idea of the construction.

Mr. Wright: Mr. Morgan is apparently being asked to testify that it should have operated in some other way.

Mr. Waller: Let me rephrase the question.

The Court: All right.

Mr. Waller:

Q. Mr. Morgan was one of the purposes or reasons for modifying the clause, that was in the mind of the officers of the Company, of Paramount, including your own, to free Paramount from any restriction as to selling second run deals?

Mr. Wright: That is certainly objectionable, so far as any other officials are concerned.

The Court: It is a leading question, in the first place.

Mr. Wright: It is a pure conclusion, so far as this witness is concerned. He should say what was said and done

with reference to the modification, and from that the Court can conclude what the purpose of it was.

The Court: As I recall, there was a time limit placed of [fol. 2456] thirty days in which notice should be given and ninety days in which the picture should be played.

Mr. Wright: No, it finally wound up—That was the way Paramount originally drew it, but Sudekum and Stengel insisted on a longer period. Now, in the record, he has thirty days to say whether he wants to play the picture or not, then if he does, he has a hundred and twenty days within which to show it.

The Court: A hundred and twenty days within which to show it. Well, of course, if he doesn't give the thirty days notice, decide within thirty days after playing any picture, under his contract that naturally frees that picture.

Mr. Waller: The point I am making is, he can go ahead and sell it at any time in the same town. This only authorizes the Crescent to show a picture in the town where it has been shown, it doesn't prevent the Paramount from selling the picture to somebody else, if it has an available print.

The Court: That is a question. So far, from all the evidence in the case, it has prevented it.

[fol. 2457] Mr. Waller: I disagree with your Honor; your Honor has been listening to Government Counsel——

The Court: You haven't introduced any proof that it was done in any place.

Mr. Waller: They haven't introduced a single witness that it was not done.

Mr. Wright: It was proven by witnesses in three places: Mr. Henry, at Hickman, and Anderson at Hopkinsville and Tim Smith at Harriman. In each case, the clause was construed so as to prevent them from negotiating for second run of Paramount pictures in the towns where Crescent was operating first run houses. The reason given was, that the franchise gave them this repeat run.

Mr. Waller: The reason was given by Mr. Wright in each case, your Honor.

Mr. Wright: It was not.

The Court: All right, go ahead.

Mr. Waller:

Mr. Morgan I am asking you as to the purposes and reasons for the modification of the repeat run clause. Have you stated what those reasons and purposes were?

A. Am I supposed to answer your last question?

Q. Yes, in other words, was there anything you wanted [fol. 2458] to add to the reasons and purposes you have already recounted in your testimony for the modification?

A. I think things are a little confused for the minute. You asked a question and Mr. Wright objected and I was wondering if I was to answer that question?

The Court: No.

Mr. Waller:

Q. I think the Court sustained the objection. I am trying to get at it in a different way; are there any other purposes that you have not expressed for modifying that clause?

A. No, I don't think I can think of any.

Q. Is a repeat run clause a usual or unusual thing in a film contract?

A. It is very usual.

The Court: Very usual?

A. Yes, sir.

The Court: Let me ask you a question: If it is very usual I assume that you had quite a number of contracts with a repeat run clause in them?

A. I imagine there are, I know I have had a few in the South.

The Court: Is it ever customary, where you have an exhibitor in one town that has competition and this exhibitor has a contract with you for first run with an option to [fol. 2459] repeat, is it ever customary, or has it ever been customary for you to sell his opposition second run of that picture before he gives notice of his option, of the exercise of his option to make a repeat run?

A. Not generally, Judge, on that single picture. That is the reason this clause has been, I think, misunderstood here. But we could and would sell an opposition theatre, if you want to call it that, regular second run for the entire year's product, but it is not customary nor do we think it is good business to take a picture away, a repeat picture or one, two or three pictures away from an old customer, and sell it to the opposition, without first offering it to your regular customer.

The Court: Before the regular customer has had a chance to make a repeat run if he wants it?

A. Or makes a repeat run, if he wants it, because there are certain big pictures that might have been played in bad weather, or there might have been a soft ball game in town the night that it was played and in our business we try to get exhibitors to repeat pictures to get additional revenue out of them, especially in these small towns where they don't have an established second run; we go back and try to get them to buy pictures over again at a reduced price to get the additional revenue from another run of that picture.

[fol. 2460] That is with reference to repeat runs. That is my understanding. We have always felt that we had the right to sell an established second run, provided that theatre has a second run policy and doesn't simply try to buy the picture to keep it away from the regular account.

Mr. Wright: I don't think Mr. Morgan's last answer here is responsive. If he wants to argue the case as a lawyer, let him do it, but this is testimony and I think it ought to be stricken.

A. I was just answering the Judge, Mr. Wright, as to my operation, my understanding of a repeat run.

By Mr. Waller:

Q. Let me ask you this question, Mr. Morgan. Does that policy which you have just stated apply regardless of whether or not there is a repeat run clause in your deal or your contract for the particular situation?

A. I don't follow that.

Q. In other words, suppose you have got a deal with an exhibitor and you have got no specific repeat run clause in your contract, do you nevertheless try to get that exhibitor to repeat the top pictures?

A. Decidedly so. Our salesmen solicit on that basis always.

Q. And do you make it a practice to solicit that customer for these repeat runs before you would offer them to a competitor of that customer?

A. That is correct.

[fol. 2461] Q. Sir?

A. Yes sir.

Q. And that, regardless of whether or not there is a repeat run clause in the contract?

A. Yes sir.

Q. Now, Mr. Wright awhile ago mentioned the Union City, Tim Smith and Hopkinsville situations. Did it come to your attention in any of those situations that the competitor Smith or Henry or Anderson wanted to buy a full second deal contract?

A. No. I don't remember the Hopkinsville situation very much because I wasn't in that but in the other two situations I know they wanted to buy a short deal, only a few pictures, and the top ones naturally, the best ones.

Q. How soon after the first run of a picture is it advisable from the standpoint of the distributor to have a repeat run played?

A. Well, it is best to keep it back as far as you can in order not to damage the first run because if the public finds out or gets the idea that pictures are repeated, back again, they might not go out to the first engagement.

By the Court:

Q. Wait until the second run and see it cheaper?

A. That is right, Judge.

By Mr. Waller:

Q. Mr. Morgan, with reference to the number of prints of a particular picture that are available, can you give us any idea of how many prints of your pictures your Atlanta [fol. 2462] exchange generally has available as compared with the number of situations that must be served? I mean during the time you were district manager.

A. Well, I can remember pretty well all them. I think on the top pictures we had around seventeen to twenty prints on the top pictures, the big ones.

Q. Have you any idea how many theatres would have to be served with those prints?

A. The number of theatres?

Q. Yes.

A. Well, there are six hundred and forty two what we call possibilities in the Atlanta exchange territory alone.

Q. Now, without regard to possibilities.

A. Those are possibilities, what we call theatres that could run your pictures, if you sold them.

Q. Well, do you generally have contracts with a large proportion of those theatres?

A. Yes sir, we do. We sell over six hundred of them.

Q. Now, does the number of prints that you have available have anything to do with the operation of your repeat run policy, that is, with your efforts to get pictures repeated and the time when you want them repeated?

A. I don't follow that.

Q. What I mean is this: You stated that it was advisable to play the repeat run a considerable length of time after the first run. Now, does the small number of prints as compared with the total number of situations to be served also affect that situation?

[fol. 2463] A. Oh yes, decidedly so, because when you have made first run deals with over six hundred exhibitors there is always a continual demand for early play dates from the whole six hundred and as a rule you can figure on an average of about two bookings at the most a week on a print, maybe a little less than that because of the length of playing time and the shipping facilities in the territory, so you can pretty well figure on seventeen to twenty prints, how long it would take to serve, give service to over six hundred first run exhibitors, and naturally it would impair your future dealings if you allowed a lot of repeat runs to be booked in the time when these pictures should be available for first run accounts.

Q. Then what is your policy with reference to serving your first run, your regular accounts and booking pictures for your regular accounts as compared with the time when you will book pictures for a repeat run?

A. Well, we determine ourselves in our negotiations with the exhibitor and from our knowledge of the town as to when the repeat run ought to be played or when we will serve it in order to protect our prints.

Q. You were asked when you were on the witness stand before whether or not this modifying clause that was dated May 25, 1939 was actually signed on the date it bears, and you were unable to give a definite answer to that question. Have you subsequently investigated that?

A. Well, I have not as thoroughly as I wanted to because [fol. 2464] I haven't been in New York very much but I can give a better picture of it now than I could before, yes sir.

Q. Well, will you do that?

A. Well, right after Mr. Unger wrote the letter, shortly after that, I advised the legal department to go ahead and draw the rider, and then I don't think it was more than thirty days that I was then transferred into the home office as division salesmanager, and I found when I got in there that the rider had not yet been prepared. I got after the legal department and they finally drew a rider, and they had drawn it on the basis of, if I recall, that they would have thirty days in which to select the picture and forty-five days in which to play it, and I called the legal department's attention to it immediately then, to the fact that we couldn't serve prints on that basis to all those towns, and I said that I would have to find out the time that had been agreed upon definitely and that they had been advised. They cut it then, the Legal Department. So they then drew another rider, which is for the present length of time, thirty and I think, one hundred and twenty days. That was sent to the district manager in Atlanta, who, in turn, sent it to, I think, Mr. Stengel, to have them signed. I think there were more than one of them, and I recall there were a lot of letters passed back and forth, follow-up letters, in order to get that back, that particular rider back, and we didn't get it back until along in the first part of the summer, close to the first part of the summer, and it was signed, and I sent it on into the legal department and they caught a clause in there to [fol. 2465] the effect that Paramount would guarantee to deliver prints in every case within one hundred and twenty days, and the legal department advised me that Paramount would not commit itself in any such manner; that we might be placed in the position of violating the contract. We then had some correspondence back and forth again with Mr. Sudekum and Mr. Stengel and the legal department had drawn a new rider, not using the one that Crescent had signed, and that was mailed to the Crescent people again. There was a little delay on that and that finally came back signed, I believe, towards the end of the summer.

Q. Well, I really wasn't calling for all of that detail, but let me ask you this question. Was the rider actually signed on or about May 25, 1939, the date that it now bears, with a slight change made in the rider, which was re-copied?

A. Yes, that was the rider actually signed by the necessary parties, exhibitor parties, and that was returned to us with this particular paragraph in it that was objectionable to the legal department. And that rider was re-drawn with

the same date on it, and that was the one that signed, and, incidentally, Mr. Waller, I believe that the correspondence will show that somewhere that rider was lost and had to be re-drawn again and finally it was signed and sent in.

Q. In any event, you understand, do you not, that the correspondence relating to that has been turned over to the Government's attorneys since you were last on the stand?
[fol. 2466] A. Yes, I understand that.

Q. I would like to ask you, Mr. Morgan, as to the advantage to the distributor of a franchise in particular reference to small towns of the kind that are included in this Rockwood chain and its affiliates, towns of two thousand population and less. Have situations of that kind in the past been a source of any substantial amount of revenue for the companies like Paramount?

A. They have been a source of——

Q. In other words, what has been the experience generally with theatres in small towns of two thousand and less?

A. Well, those towns are a continual source of worry because it is usually those towns that are opened and closed and changing hands, exhibitor hands.

Q. What about the play-off of contracts by operators of theatres in small towns of that character? What has been the experience of Paramount?

A. Well, the great majority of the distributors' difficulties in the play-off of the pictures is in small towns.

Q. Will you compare the situation from the standpoint of Paramount as to the small towns in Tennessee before and after your franchise with Rockwood and its affiliates, and I am referring to such towns as Manchester, Tennessee and Tracy City, Tennessee?

Mr. Wright: Well, if the Court please, now, what is the issue we are on now?
[fol. 2467] The Court: I don't know.

Mr. Waller: We are on the issue, your Honor, that a franchise is a perfectly legal business document and not an instrument in restraint of trade.

Mr. Wright: What has this comparison got to do with that, that issue?

Mr. Waller: Well, it has this to do with it. It is good business for Paramount to sew up good revenue in towns of that kind where they previously had been having great

difficulty in getting revenue and great difficulty in handling accounts.

Mr. Wright: We are not making any contention that this might not have been good business for both Paramount and Crescent. Our contention is simply that the effect of it was to sew up a Rockwood monopoly in those towns and a Crescent monopoly in the towns in which it operated and prevent any independents from coming in and competing with Crescent or the other exhibitors in those towns in the licensing of Paramount pictures. Nothing he is asking here has any relevancy whatsoever to that question.

Mr. Waller: I also want to show, Your Honor, that in a [fol. 2468] number of those towns there were never any theatres before.

Mr. Wright: Well, what of it?

Mr. Waller: The Government seems to lose sight entirely, it seems to me, your Honor, of whether or not a violation of the Sherman Act in a particular situation depends upon the competitor's intent, as one of the facts, and also upon the public interest, as one. I don't mean to say that a violation of the Sherman Act would be excused on the theory that it is in the public interest but in determining whether the Sherman Act has been violated the public interest is an important criterion.

Mr. Wright: There is no question evidently here. The parties are conclusively presumed to have intended what they accomplished and that was a complete suppression of competition for the five year period in those towns.

Mr. Armistead: Well, he is testifying now.

The Court: I overrule the objection. Go ahead.

(Question read by the reporter)

Q. And others of that size?

[fol. 2469] A. Well, in some of those towns there were no theaters, and prior to the time of the franchise no theaters operating, and in some cases theaters had been closed for a long time; in other cases, there were theaters that were opened and closed spasmodically; there were different ones; a couple of towns in North Carolina; and Spruce Pine, and Guthrie, Kentucky,

Q. Guthrie, Kentucky?

A. Kentucky. You are taxing my memory to remember those small towns; but I would say there were several that

we had either not been getting revenue from or getting a very spasmodic revenue from, over a period of years, until we made this deal.

Q. There has been testimony, Mr. Morgan, in regard to the character of the Crescent theaters and the appearance of the Crescent theaters and the appointments and furnishings of those theaters; will you state whether or not it is of any advantage to a distributor such as Paramount to have its pictures shown in theaters of that type rather than in theaters of a different type?

A. Well, it would be destructive to Paramount or any other company to show its pictures in inferior theaters; and, naturally, it is Paramount's policy to show its pictures in the best theaters and the best operated theaters, to show its pictures.

[fol. 2470] Q. To show its pictures?

A. Yes.

Q. Do you have particular reference to situations where there are may be two theaters in the same town?

A. Oh, certainly, in the same town.

Q. When you were on the stand before, Mr. Morgan, Mr. Wright referred to a letter addressed to you by Mr. Cecil House, dated November 4, 1938, and I find that that letter has not been marked as an exhibit. I will ask you if you received that letter from Mr. House?

A. Yes, sir.

Q. Will you mark that as Defendants Exhibit No. 102?

Mr. Wright: May I ask for what purpose that letter is being offered?

Mr. Waller: The letter was referred to in the examination of Mr. Wright of Mr. Morgan, and I want the whole of the letter in evidence.

Mr. Wright: The letter, if the Court please, contains a quotation from a letter signed by a Mr. Pickett, and I assume you are not offering it to prove anything that is stated in there with respect to what Mr. Pickett has [fol. 2471] said?

Mr. Waller: I think letters that were introduced would have the same probative value as the letters introduced by the Government.

Mr. Wright: I agree with you. This is not a letter from Mr. Pickett; this is a letter from House to Mr. Morgan with

something Mr. Pickett said; it is not being offered to prove anything Mr. Pickett relates there?

Mr. Waller: You don't think that the best evidence of what it contains?

Mr. Wright: I think the best evidence of what Mr. Pickett said would be in Mr. Pickett's letter that he wrote.

Mr. Waller: I will ask counsel if they would be willing to stipulate that Mr. Pickett did write the letter in the ordinary course of business?

Mr. Wright: He didn't write that letter at all. I would have to see the letter first and know the circumstances under which it was written. The only relevancy the letter has in the case, if the Court please, and the only reason I [fol. 2472] asked Mr. Morgan about it, is to show there had been a complaint to the Department of Justice at the time the letters were offered by Mr. Smith; it was perfectly competent for that purpose.

Mr. Waller: I think Mr. Simon has the original letter from Mr. Pickett to Mr. House, and I ask counsel if they will stipulate that he wrote that letter pursuant to his duties with Paramount?

Mr. Armistead: They have introduced letters from dead men.

Mr. Wright: How is that?

Mr. Armistead: I say, you have introduced letters from dead men.

Mr. Wright: We didn't have to introduce letters from dead men; we produced every man that wrote a letter which we offered, and I think we want the same offer as to Mr. Pickett before we stipulate on that.

Mr. Waller: I will formally state that Mr. Pickett has been in an institution for the mentally deficient, or something of that kind, and is just out.

[fol. 2473] The Court: You offer the letter in evidence?

Mr. Waller: Yes, sir.

Q. Mr. Morgan, I also hand you a photostatic of a letter taken by the Government from Paramount files, being addressed by Mr. House to Mr. Phillips, with a copy to you, dated November 25, 1938, relating to the Tim Smith affair, and enclosing a copy of a letter from Mr. L. C. Loew to Mr. House, dated May 10, 1937, in regard to Tim Smith; I will

ask you if you received that letter, and the enclosure with it?

A. Yes, I remember that.

Mr. Waller: I offer that and the attachment as Defendants Exhibit No. 103.

Q. Did your receive that letter and the enclosure in the progress of your investigation of the Tim Smith complaint to the Department of Justice?

A. Yes, sir.

Mr. Wright: Now, here is a letter, if the Court please, written by L. C. Loew attached here and one written by Cecil E. House; I think we ought to have the same oppor- [fol. 2474] tunity that was given the defendants, to examine these people, if those letters are being offered to prove any facts in there; if they are simply offered to show Mr. Morgan got knowledge out of those letters at or about those dates, then it would be thoroughly competent to show that.

The Court: This letter is not to Mr. Morgan?

Mr. Waller: A copy to Mr. Morgan.

[fol. 2475] The Court: Well, if that is introduced for the purpose of showing that Paramount offered to sell Tim Smith the S-8 contract, of course it is incompetent.

Mr. Waller: I want to refresh his recollection, Mr. Wright introduced proof that they did not undertake to deal in the pictures with Mr. Smith, until after this complaint to the Department of Justice.

Mr. Wright: The testimony that Mr. Morgan gave before related to an offer that he directed they should make to Mr. Smith in November, 1938 he had with him, and identified a list here of projected pictures of Paramount, then he said he took a lease so that there were offers and that they instructed his salesman to go on and offer the pictures to Smith and he first testified that he told hi— had knowledge of the Department of Justice complaint, then his attention was called to the other letter that Mr. Waller showed him that he had received from the Justice Department, and with reference to the complaint, and I believe the salesman made an offer, He offered a deal. That is the status of the record, and this has nothing to do with it.

[fol. 2476] The Court: This is prior to that time, this is in May, 1937.

Mr. Wright: Yes, this refers to the previous year's deal with a salesman before there was any complaint to the Department of Justice, at the time the salesman of his own volition went in to try to sell Smith the 1936-37 deal, that was the year that Crescent bought Paramount in 1935-36, Crescent had that and the salesman went in and talked to Smith about the 1936-37 deal, that is what that letter relates to, and that has no basis of that complaint to the Department of Justice, and it has nothing whatever to do with Mr. Morgan's testimony of the offer rejected in his office.

Mr. Waller: In view of the fact that Government counsel took that photostat out of Paramount's file, I will ask you if your will make a stipulation under the same terms that we did.

Mr. Wright: We will make a stipulation, the same stipulation we made with you, if you give us an opportunity to interview the man who wrote it, without that opportunity I do not see why we should stipulate.

[fol. 2477] Mr. Waller: Mr. Morgan, I have offered the exhibit to be marked——

The Court: Let it be marked, and the objection sustained.

Mr. Waller:

Q. Mr. Morgan, can you state whether Paramount offered any pictures, or whether they came to your knowledge that Paramount in your capacity as district manager of Paramount in Atlanta, that pictures had been offered to Tim Smith at Morristown, before the Department of Justice complaint?

A. Repeat that question?

Q. Did it come to your attention or to your knowledge as district manager of Paramount in Atlanta that before the Tim Smith Complaint to the Department of Justice, an effort had been made by Paramount to make a deal with Tim Smith at Morristown, Tennessee, for the next or previous year's product?

A. Yes, sir, I made that statement when I was on the stand before, and I say now my impression is that we had offered pictures to Mr. Smith, and I will say yes to that question.

Mr. Waller: Your Honor I think that is about all, and I think that will be all, but I might want to ask one or two [fol. 2478] more questions.

The Court: Al- right, adjourn court.

Afternoon Session. Oscar Morgan, continued.

Mr. Waller:

Mr. Morgan, I have been reminded that when you were on the stand before and questioned by Mr. Wright, you were asked to furnish a list of some of the other circuits of theatres for the purpose of comparison with the Crescent Circuit; have you complied with that request and have you compiled that information?

A. Yes, I have. I have in my pocket a memorandum.

Q. Will you give the information?

A. These may not be the corporate names of the circuits, but as we call them, as we know them and call them. The E. M. Loew, in New England. Walter Reade, mostly in New Jersey, has some theatres in New York state. McCealle and Henfe. The Brandt, New York City and surrounding towns. Century Circuit in New York City. Cocalis, New Jersey and New York. Co-operative, Detroit. Evergreen, Northwest. R. E. Griffith, Texas. L. C. Griffith, Oklahoma. Griffith and Dickinson, Kansas and Missouri. Harris Amusement Company, Martin Theatres, Georgia, [fol. 2479] Alabama and Florida: Prudential Circuit, New York. Randforce, New York. Bobb and Rowley, Texas, Oklahoma and Arkansas. Schine Circuit. Shea theatres, New England. George Skouras, New York City and surrounding cities. Wilmer & Vincent, in Pen-sylvania and Virginia. Affiliated, Louisiana.

Q. Is that all?

A. I just took off what I thought was a sufficient number.

Q. What is the basis of comparison?

A. The basis of comparison is in revenue. I would say that those circuits run anywhere from twenty to a hundred theatres, but the basis that we took them off in my office was on a basis of film rental as compared with the Crescent Amusement Company.

Q. Do you mean by that that those circuits or chains you have mentioned are circuits or chains from which Paramount derives a greater annual film rent?

A. Yes, sir, annual film rental.

Q. Than from the Crescent Amusement Company?

A. Yes, sir.

Cross-examination.

By Mr. Wright:

Q. Mr. Morgan, the circuit that we were talking about [fol. 2480] when you testified before, you were referring to independent circuits, do you remember that?

A. Yes, sir, that is right.

Q. And I asked you to name some of the other independent circuits that you thought were larger, you have a lot on this list here that are not independent at all, is that right?

A. If they are I don't know it.

Q. How about Evergreen?

A. Who?

Q. Evergreen, isn't it a Fox or Fox Coast affiliate?

A. A Fox and Fox Coast affiliate? Possibly I am not as familiar with them, I knew them from Mr. Frank Newman.

Q. You do not know whether it is affiliated or not?

A. No, sir. I told you how I got these, Mr. Wright, had my boys in the office, I told them what I wanted and told them to go and check the records and take off the independent circuits, and that is the way we got it.

[fol. 2481] Q. You know that Skouras in New York City is affiliated with RKO?

A. No sir, I don't know that, not George Skouras, I never knew that.

Q. Do you know that he is not?

A. No, I don't know that he is not but in my dealings with him I deal with him as an independent.

Q. Wilmer & Vincent is affiliated with Loew?

A. Now, that I don't know, I am not familiar with that.

Q. You don't know whether it is or not?

A. No.

Q. You haven't attempted to determine whether the theatres you were listing were or were not independent circuits?

A. No. I have been dealing with a lot of those circuits for years and I never had any knowledge of it.

Q. "No" is enough for the answer. Now, I would like to call your attention to a question, to an Exhibit that you testified with respect to when you were here before, that

is, a letter from you to Mr. Unger, dated November 14, 1938, marked Government Exhibit No. 152. In that lettter, with reference to the Crescent Circuit, this paragraph appears:

"In any event, the only way we could sell second run, even if we wanted to, in this particular town"——

[fol. 2482] You are referring to Morristown there and Newport—(Reading)

—"would be after Sudekum had taken the refusal because paragraph E of Article 8 of the Crescent Amusement Company franchise provides that he can repeat any picture at a certain given price."

A. Uh-huh.

Q. The statement I have just read you was correct at the time you made it, wasn't it?

A. What do you mean by the statement I made being correct, Mr. Wright? I don't understand you.

Q. I don't know how I can put it any plainer.

The Court: Well, that is a construction that you placed upon that paragraph at that time?

A. No. If your question is, that my understanding then was that we could not sell Tim Smith a regular second run for all our product, I would say no, that I did not put that construction on that letter when I wrote it.

The Court: You say the construction set down in the letter would only apply to less than an entire contract, to spot booking or a number of pictures for second run, instead of an express contract for the entire season's product; is that the difference that you make?

A. Yes. There is a difference that has not been thoroughly brought out, to my point of view, yet, for me. That is this: [fol. 2483] Take an exhibitor who will ask for a limited number of pictures, which doesn't have a regular established second run house, it would be, it always is the policy of our Company first to offer those pictures to its regular customer for his refusal, whether he has got it in a contract or he has not; because it would be destructive to allow the other theatre to take the best pictures and run them second run and sign them upon a contract. But where a theatre is operated by a reputable exhibitor as an estab-

lished second run and runs nothing but second run pictures, we would then consider a second run contract. In the case of Tim Smith, what I meant in that letter was, the reason we couldn't sell him if we wanted to, he had asked for ten pictures second run, ten or sixteen pictures, I forget the exact number; that is all he wanted.

Q. Do you recall that you testified and the explanation you made at the time you testified here before was, that that clause prevented you from selling second run to Tim Smith because repeating of the pictures by Crescent would destroy the value of the second run; do you recall that?

A. I don't recall testifying to that fact at all, Mr. Wright.

Q. In any event, it is pretty clear, isn't it, that you could not, that you would not expect somebody to buy a full season's contract second run and not know whether the pictures he bought second run were going to be played for a repeat run in the opposition houses run by Mr. Sudekum [fol. 2484] or not, would you?

A. Ahead of him, you mean, ahead of him, play ahead of him?

Q. Any time?

A. Why, certainly not, because I still say that we have that right, under that clause, to sell second run or any run we want to, to a regular established run.

The Court: What he meant was, if you sold a regular second run contract for any particular season, that the exhibitor that you sold second run contract to, wouldn't know whether he was going to get a second or third run?

A. No, he would get a second run, it would be written on his contract.

Mr. Wright:

Q. You couldn't write a contract with another exhibitor, except subject to the terms that you had already incorporated in your franchise with Sudekum, isn't that right?

A. No, that is not right, that is not my understanding of that clause.

Q. Why did you make a contract, what is the purpose of making a contract and putting the terms in it?

A. At that time, as I explained to you before,——

Q. Just answer the question.

A. I am trying to answer your question.

[fol. 2485] Q. That calls for a yes or no answer.

A. Ask the question again.

The Court: You say it calls for a yes or no answer; he couldn't perhaps answer that yes or no.

Mr. Wright:

Q. I ask you for what purpose you make——

A. I would like to have the question repeated.

Q. I will put it this way; The purpose of making a franchise and writing certain terms into it, is to determine what the respective rights of your Company and the Crescent Amusement Company are, with respect to licensing films in the town where they operate, isn't that right?

A. Certainly, yes sir, that is correct.

Q. And after you have incorporated those terms in the agreement which you both have executed, then whatever else you may do, or other deals that you make in the future, with other exhibitors in those situations, are subject to whatever terms are incorporated in the deal you have made with Crescent Amusement Company, isn't that right?

A. That is elemental, that is right, yes.

Q. Now, I call your attention to your testimony, as to what the effect of this provision would be on a contract you may have sold to Tim Smith, any big pictures; you testified [fol. 2486] at page 1667 in the record, in response to a question by Mr. Armstead, where he says:

"Q. I note in Government Exhibit 152, a letter dated November 14, 1938, where you state this: 'In any event, the only way we could sell second run, even if we wanted to'—That is the one I just quoted from, where you wrote Unger and where you said this: 'In any event, the only way we could sell second run, even if we wanted to, in this particular town, would be after Sudekum had taken refusal—'' etc.

"A. That point is simply this: That Tim Smith simply wanted about ten or twelve second run pictures, it is obvious if Sudekum was going to repeat he would repeat only on the big pictures and he would have a right to repeat 'run, which would destroy the value of those pictures so far as Tim Smith was concerned, if Tim Smith would not buy all the contract."

That is correct?

A. I can't recall I testified exactly that way, but——

Q. That is true, anyway?

A. There is something wrong in that testimony. I didn't [fol. 2487] testify that way.

Q. What is wrong with it?

A. Well, this is wrong about it: what I explained then was, that he only wanted to buy ten pictures, second run and he wouldn't buy those pictures third run after Sudekum, because the repeat run would then have destroyed their value.

Q. And the repeat run would destroy the value if any big picture that Sudekum might repeat, even if Smith, or any other exhibitor that wanted to buy second run, bought a whole season's contract, isn't that right?

A. If he bought them third run, they would destroy it, yes sir.

Q. You didn't say anything about third run?

A. Yes, I did, Mr. Wright, because that is a confused statement there.

Q. As a matter of fact, let me read this to you again?

A. I heard it, I know just how it reads.

Q. And you say you were mistaken, from this?

A. No, I didn't say I was mistaken, I said there is a mistake in there. I don't recall testifying to that, Mr. Wright.

Q. You say there was an error in the transcribing of this testimony?

A. I think there is something either left out or an error, because here is what I meant——

[fol. 2488] Q. Just a minute. Do I understand you correctly now that what you wanted to say was that if Tim Smith wanted to buy big pictures third run, then the repeat run option would have destroyed the value of those pictures; is that correct?

A. No, that is not what I am telling you. You have to get back to the fact that he wants to buy ten pictures, and the statement I made, that we would consider selling a regular established second run house, who ran nothing else but that; but when Tim Smith only wanted to buy ten pictures, we would not, under any conditions, as long as that repeat option was in our franchise, with the right to repeat, and the only house that could take it, and that it would be first given to Sudekum, and the value of those pictures, before he bought them, would be destroyed, he wouldn't buy them third run.

The Court: You don't sell a second run contract then?

A. We would sell a second run contract, we still can under that contract, to a regular second run house. There is confusion about that repeat run. Repeat refers to one picture only. Second run means a whole year's policy in any theatre.

Q. There is no confusion about the clause. The clause doesn't limit Sudekum to any pictures at all, it gives him permission to play any picture that he pleases?

A. That is correct, Mr. Wright, that is correct. But the [fol. 2489] expression, in our business, the use of that refers to one, to each picture. We don't sell a contract and write in it, a full season's contract, and write on that contract "Repeat run".

[fol. 2490] Q. Now, let's see if we can straighten this matter out, how the specification was arrived at.

A. There was a lot of correspondence on that.

Q. Now, I will hand you a letter dated June 9th, 1939 signed by Mr. Stengel, addressed to Mr. Kirby, with copy for Mr. Wilkes and you, and ask you if that letter was received in the Paramount office shortly after that date. (Handing letter to witness).

A. Yes sir. I haven't seen that letter in months.

Q. I will hand you letter of June 19th from you to Mr. Stengel and ask you if that is the reply that you wrote to Mr. Stengel on or about June 19th, 1939. (Handing letter to witness).

A. Yes, that is the answer.

Q. And I will hand you then letter of September 7, 1939 from you to Mr. Wilkes and ask you if that is copy of letter you wrote to Mr. Wilkes on that date.

A. Yes, I signed that.

Mr. Wright: I will ask to have these marked Government Exhibits Nos. 347, 348 and 349.

(Papers so marked).

I would like to read this Government Exhibit No. 347, the letter from Mr. Stengel to Mr. Kirby with copy to Mr. Morgan, dated June 9th, 1939.

"DEAR JOHN:

"We have your letter of June 2, wherein you enclose [fol. 2491] riders for our signatures. These riders are with regard to the playing of repeat run pictures.

"I have carefully read the riders, as well as Mr. Morgan's letter. It is not our intent to be arbitrary in this matter nor do we wish to try and pin Paramount down to one certain booking. As the rider is now written, however, it is very probable that we would be unable to mutually agree on a date within the ninety day period.

"I think you will agree, after careful consideration, that this could easily happen inspite of the fact that your booking department and ours work together 100 per cent. To better illustrate the point in question—supposing one of our theatres played Union Pacific on or about release date and that we wished to repeat within the ninety day period. It seems to us that there would be a natural scarcity of booking time due to hold-overs, etc., which might easily prohibit your office confirming this picture for the repeat run.

"In other words, you would probably want to take care of the first run situations in your Exchange territory before filling our repeat dates.

"Don't you think a qualifying clause should be inserted in the riders to the effect that, if we are unable to mutually agree on a repeat run date within the ninety day period, then in that event we will be permitted to play the picture in question as soon after the ninety day period as dates can be made available.

[fol. 2492] "Please be kind enough to advise us your disposition in this matter at your convenience. • • •"

Q. Now, having read that letter, it is clear to you now, is it not, that at that time the clause which was being referred to provided only for a ninety day period within which to select and play pictures?

A. That is right.

Q. And you didn't want to commit yourself definitely to furnish prints within the ninety day period and Mr. Stengel wanted the agreement modified to provide that if you were not able to furnish the prints within the ninety day period, then he was to be able to exhibit as soon after the ninety day period as you could furnish the print, is that correct?

A. That is right.

Q. This is the reply from Mr. Morgan to Mr. Stengel, dated June 19, 1939, marked Government's Exhibit No. 349:

"Dear Kermit:

"I have read your letter of June 9th to John Kirby about the rider as affected by the 90-day period in which you are to play your repeats. While the Legal Department wanted a shorter space of time, I finally explained the matter to them—but after all, Kermit, there are two sides to everything, and I think maybe you are drawing a line too fine.

"I think it would be advisable for you to agree to [fol. 2493] the rider as we have drawn it, because certainly we can agree on repeat dates within the period mentioned, but while you are so insistent on being protected, we want the same right of being protected. As a matter of fact, Kermit, the new Trade Practice Agreement provides that an exhibitor must agree to select his pictures on repeats or Short sales within 21 days after avaliability—so you can understand that we are being far more liberal than that. I don't feel that you need to worry about the problems you brought out in your letter, as over the last two years, you will find I am sure, that you had no difficulty on the very thing you're talking about.

"Finally, after all, under franchise, we are supposed to be some form of moral partners, and it is to the advantage of both of us to work together. Frankly, I would rather not for many reasons change the rider, and will greatly appreciate it if you will therefore sign and send through to John's office."

Q. Now, isn't it a fact that neither Mr. Stengel nor Mr. Sudekum did sign and send through the riders in that form?

A. That I can't say. I don't recall that.

Q. Well, you can recall——

The Court:

Q. Well, it wasn't finally executed in that form, was it?

A. As a matter of fact, I think in the final rider it was a [fol. 2494] hundred and twenty days. Didn't you call that to my attention?

By Mr. Wright:

Q. That is what I was calling your attention to.

A. Yes sir.

Q. The rider, as finally worked out, dated May 25th, 1939—I take it, the agreement as finally worked out was dated back to this date?

A. No, that is not so; that is not right.

Q. Well, these letters that I have just referred to were dated in June, 1939, were they not?

A. Yes sir, I know that.

Q. And at that time you hadn't reached an agreement upon the wording, the final wording of the clause, that is correct, isn't it?

A. Yes sir, we had reached an agreement, Mr. Wright. At least, they thought they had reached an agreement. They signed that rider and sent it back and they inserted a paragraph in it to protect them, and that caused these letters. The legal deparment told us we couldn't have that paragraph in there, and then later on, because we couldn't have that paragraph in there, we changed it from ninety to one hundred and twenty days.

Q. Well, that was done after the last letter that I showed you was written, was it not?

A. Yes sir, it must have been.

Q. Now, I will read this letter of September 7th, 1939, from Mr. Morgan to Mr. Wilkes, Government's Exhibit No. 348,

[fol. 2495] "Rockwood Amusements Inc.
Crescent Amusement Co.

DEAR MR. WILKES:

We attach approved riders for Sudekum covering repeat runs."

Q. Now, that is the time when the riders, as they now appear in the contract, were finally executed, is that correct?

A. Well, I don't know whether finally executed—I know that was the date they were mailed back to the district office.

Q. It couldn't have been more than a day or two before that?

A. It could easily have been.

Q. Well, you had been attemtping for some time to get the riders in, hadn't you?

A. Yes sir.

Q. And under those circumstances there wouldn't be any occasion for you to delay forwarding them as soon as you got them?

A. Well, Mr. Wright, I am away from New York—it is possible I might be away for a month and get back and send something out.

Q. Well, in any event, these riders that were forwarded with the letter of September 7th contain the same terms that are now found in the rider attached to the franchise marked Government's Exhibit No. P-25, is that not correct?

A. Mr. Wright, can I see that, the last yellow letter?

Q. You had better look at both.

A. No, I know the rider. I have looked at the rider. I don't have to see that. I just wanted to see something in [fol. 2496] that yellow letter. (Letter handed to the witness)

A. Yes, that is the form in which it went back with that letter.

Q. Now, you recall the Judge asked you this morning whether this particular form of rider was usual in your business?

A. No, I didn't understand the Judge to ask if the rider was usual. I understood him to ask if it was usual to have repeat clauses in franchises.

Q. Well, in any event, this particular repeat clause was not the usual form of clause?

A. No, the usual form of clause is to put a limitation. As that rider is drawn is the usual form of repeat clause. In some cases you might pin it down a good deal more where you are dealing with second run exhibitors but that is usual—I will say, not usual but done many times in our business, Mr. Wright, give an exhibitor repeat privilege.

Q. Can you refer me to any other clause that you have got attached to a franchise which has the same terms that this one has?

A. Well, I couldn't do it now from memory, no.

Q. Do you think you could find one for us?

A. I wouldn't want to say whether I could but I am saying that from my experience in selling films for this company for a good many years I have written many contracts giving the exhibitor the right to repeat at a certain given film rental.

Q. Do you recall any of those you have written where the [fol. 2497] exhibitor had a competitor who was trying to get your pictures?

A. No. I can't recall some but I think there are some.

Q. You think you can find any of those?

A. I don't know that I can. I am just recall from memory.

Q. Will you make a search?

(No response.)

Q. Now, I think this morning you undertook to testify about your company's policy with respect to franchises, is that right?

[fol. 2498] A. Its policy?

Q. Uh-huh?

A. Well, I don't know what the exact questions and answers were, but I answered the questions as to what we did and the advantages of franchises.

Q. Well, I got the impression that you testified that the policy of your company was to make franchises wherever you could, because you thought they were advantageous, is that right?

A. Yes, that is right, Mr. Wright.

Q. Now, do you have one policy with respect to circuits and another with respect to independent exhibitors?

A. No, sir.

Q. Well, I will call your attention to a letter that is in evidence here, or two letters; I believe the photostats of these letters are in evidence; one is dated March 2, 1937 from Mr. Barnard to Mr. Dozier, marked Exhibit No. 59, and the other is dated February 11, from Mr. Barnard to Mr. Dozier, which is marked 58, and I show you these originals and ask you to read those.

A. I have read them.

Q. Now, this letter from Mr. Barnard to Mr. Dozier, dated February 11th, says "Replying to your letter of February 8, we should like to advise that the Company does [fol. 2499] not look favorably upon franchises as a matter of policy." You think that was an incorrect statement of the company policy?

A. No, I think it was a very graceful way of getting out of giving that exhibitor a franchise; that is all that letter is.

Q. I would agree with you except as to the graceful part of it.

A. Well, I will agree with you on the graceful part of it.

Q. In this letter of March 2nd, from Mr. Barnard to Mr. Dozier says: "As I had anticipated, the Home Office, as a matter of policy, does not wish to make more than a one year deal in any situation except Earlington."

A. Well, that is not right. They just didn't want to make that deal.

Q. That is another graceful way of not making a franchise, is that right?

A. I will agree with you about the word "graceful"; that is not a good word; but they didn't want to sell the franchise; they just didn't want him to have a franchise.

Q. I believe you have testified heretofore that there were a great many advantages in Paramount making franchises in these small towns, because in that way you made theaters grow there that wouldn't be there before?

A. That is correct.

[fol. 2500] Q. And one of these situations you mentioned specifically was Spruce Pine, North Carolina?

A. That is correct.

Q. I call your attention to a letter dated December 28, 1937 from you to Mr. Stengel, and ask you if you wrote that letter on that date?

A. Yes, I think I did.

Q. I will ask you to have that marked as the next Government Exhibit. (Marked Government Exhibit No. 350 by the Clerk) This is a letter marked Government Exhibit No. 350, from Mr. Morgan to Mr. Stengel, dated December 28, 1937, Spruce Pine, North Carolina: (Reading:)

"DEAR KERMIT:

I am advised by our Charlotte Manager, John Kirby, that Mr. J. A. Taylor has sold the Piedmont Theater, Spruce Pine, N. C., to the Cherokee Amusement Company. We sold 52 features as follows:

10 pictures—2 days $15.00 Against 38%
42 pictures—2 days 9.00 Flat
Score—$3.00 all pictures

We sold 52 shorts in this situation.

I wish you would please advise us whether you are going to assume these contracts; if not, we can go ahead and contract for Spruce Pine on the basis as

[fol. 2501] we have the S-10 deal set up now for Spruce Pine, both features and shorts.

I wish you would please advise me about this as soon as possible."

Q. Now, it appears from this letter, does it not, that you had a customer in Spruce Pine who was already using your S-9 product?

A. That is right.

Q. At the time you negotiated the deal with Mr. Stengel?

A. Yes, we had sold it to that gentleman, that is right.

Q. And then your reference here to the S-10 deal which was set up here which is a deal for the S-10 for the next season, as it has been incorporated in the Rockwood franchise?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. So, so far as the effect of the franchise on Spruce Pine was concerned, it was simply to take the product away from the customer who had been buying it and give it to Mr. Stengel, is that right?

A. That is not so. Mr. Wright, no theater had operated Spruce Pine up to about a year before; I think that name was only in there one year.

Q. Well, at the time he was in there and playing your pic-[fol. 2502] tures was the time that you negotiated——

A. For a one year deal.

Q. —Just a minute: The time that you negotiated the franchise which includes this town with Mr. Stengel, isn't that right?

A. Yes, that is right.

Q. And you put the pictures for the next year—You omitted the S-9 features from the franchise from the Spruce Pine situation because of this contract with this existing exhibitor there; that is right, isn't it?

A. Yes, sir, that is right.

Q. But you did go right ahead and sell the pictures to Stengel for Spruce Pine for the next four seasons, beginning with S-10?

A. We did, yes, sir.

Q. And you did that without consultation with or prior offer to your old customer there at all, didn't you?

A. Yes, sir, that is right.

Q. And at the time you made this franchise for the succeeding four seasons with Mr. Stengel, Mr. Stengel didn't even have a theater in Spruce Pine, did he?

A. At the time we—I beg your pardon; at the time we made the franchise with Sudekum, we were advised that Stengel—we were advised that Crescent would have a theater in Spruce Pine.

[fol. 2503] Q. Yes, I understand, but when you made the franchise you knew this man had a theater in Spruce Pine?

A. No, we were negotiating with this man in this theater.

Q. Who was he?

A. I beg your pardon?

Mr. Waller: Now, your Honor, it seems to me like questions are now being asked that are based on a hypothesis that is exactly contrary to the record. The record shows that early in December, or sometime before the date of that letter in 1937, that this man Taylor, who was taking over the theater at Spruce Pine sold out to Cherokee.

Mr. Wright: No, the contract that was made with Mr. Stengel is in evidence here; that is the Rockwood branch.

Q. It was made and negotiated in the fall of 1937, was it not?

A. Yes; but I don't know, Mr. Wright, whether that particular town was included in the original negotiations, as towns were added over these two years as we went along before the franchise was finally concluded.

Mr. Wright: Have you got a copy of the Rockwood franchise there, Mr. Clerk?

[fol. 2504] The Court: Well, the Cherokee did buy out the exhibitor at Spruce Pine who held your 1939 product?

A. Yes, sir, so far as I know we did.

The Court: Does that letter refer, just at that time there, does that refer to taking over the unplayed portion of that conract?

A. Yes, sir, my reference is to the whole contract. My memory is not good enough to remember whether that man ever played any picture, but the letter means that they were asking whether they were to take the then existing unplayed portion of the contract, whatever it was.

Mr. Wright:

Q. When you were negotiating that franchise, instead of naming the theatre, you simply wrote in the word "new"?

A. Yes.

Q. Where they were——

A. Where they were going to have a new theatre.

Q. Just a minute, that referred to a theatre that was not even built, was not then in existence, but one which the exhibitor expected to acquire?

A. That is right.

Q. That is right?

[fol. 2505] A. Yes.

Q. So that, if it appears when you have located the franchise that the word "new" is in there for the theatre, all like product in Spruce Pine, that would indicate at the time you made the deal, the theatre had not been acquired yet, is that correct?

A. No.

Mr. Waller: If Your Honor please, Cherokee built a theatre there.

Mr. Wright: He doesn't need help.

Mr. Armistead: You do, though.

The Court: Let's find the franchises, they ought to be here somewhere.

A. No, Mr. Wright, it could mean a new theatre. Frequently when exhibitors are going to build a theatre, they do not know what they are going to name it, so if you are building we use the word new, that is customary in our business.

Mr. Wright:

Q. I hand you this document and in that column Spruce Pine, in the theatre column, the word "new" appears, doesn't it?

A. That is right.

[fol. 2506] Q. So that for the last four years, at the time you negotiated the franchise for the last four years of the five there, you did not know what the theatre, they were going to use was named, did you?

A. That is correct, I don't know whether they were going to build one or acquire one. But I understood they were going to build one in that town, Spruce Pine.

The Court: What is the date of that franchise?

Mr. Wright: Do you have it there?

The Court: What is the date of the franchise, please.

Mr. Wright: The franchise is dated July 28, 1938, as of November 1, 1937.

Mr. Waller: And that new theatre was opened on December 7, 1937.

Mr. Wright: Now as a matter of fact——

The Court: Well, it appears here they bought it, bought out this theatre at Spruce Pine before he played out his [fol. 2507] 1937-1938 contract.

Mr. Wright: They bought it in December, just about the time that letter was written, that was the letter he wrote right after he sold out the house,—the point is, before he sold the house, Paramount had already sold him the product away from him in that town, to Cherokee for either his house if they decided to buy his, or for a new house if they wanted to build one.

Mr. Waller: The franchise was signed in July, 1938, about seven or eight months after Cherokee had opened their new theatre, but about the same length of time after this man sold out, Your Honor, and included that. Your Honor will recall that there was a man named Taylor at Spruce Pine that was leasing that theatre to Gutschalk, and the owner at about that time was trying to lease it, and when Cherokee came in he sold it to them, and had some conversation with Fred Gorman about the price and equipment.

The Court: This does not refer to the franchise, this refers to the S-10.

[fol. 2508] Mr. Wright:

Q. I asked him whether he referred to the deal, not the franchise, and he said it did?

A. That is right.

The Court: Were you negotiating on this franchise at the time you wrote this letter in December, 1937?

A. Decemebr, 1937?

The Court: Yes, sir.

A. No, the franchise was signed.

The Court: It was not signed until July, 1938.

A. We were negotiating, and negotiated right up to the last minute.

Mr. Wright:

Q. You had been negotiating prior to that time for three or four months, had you not?

A. Yes, we had, but it could be possible we had not been negotiating on Spruce Pine; that was the point I wanted to make. I so understood along during that period, if we wanted to do it we went along if some one wanted to open a new theatre we would negotiate on it.

Q. But you do not recall the particular time he wanted [fol. 2509] to do that in?

A. No, I do not recall that, Mr. Wright, I do know this, that I know that they were furnishing it and were selling the exhibitor at Spruce Pine, because this fellow wanted to lease this theatre, he wanted to sell it or lease it, rent it for him, and that was not a question of taking the service away from him.

Q. Well, in any event, you did not give him an opportunity to buy it for the next succeeding season before you put it into Rockwood?

A. No, we sold it, we consulted with their Charlotte branch manager, and he said it was all right, to go ahead and sell the product in Spruce Pine, because he did not think this man was going to continue to run the theatre, and that town had not had a theater in there for a long time, or had it closed, it had been closed rather for a long time.

Mr. Wallace: I take it the Government does not contend that it is illegal to sell somebody else if the theatre is closed.

Mr. Wright: We certainly do not, the record I think shows that the deal was set up for Spruce Pine at least prior to the time that letter was written.

Q. Now I think you testified to some more advantages [fol. 2510] of this franchise for the rentals you were going to get over — terms for this year, one year?

A. That is correct.

Q. As a matter of fact, the franchise did not give you any protection against full performance of pictures that you might release under it at all, did it?

A. I do not know what you mean, Mr. Wright.

Q. Even where you have a franchise, if you make some bad pictures and they do not do too well, you make an adjustment, is that right?

A. That is possible in some cases, yes.

Q. In this particular case right after the franchise was written and down to the present time, there has been a continuous series of adjustments of rental under the franchise, isn't that correct?

A. Where, Mr. Wright?

Q. I will show you these folders here, one of which contains modifications of the Rockwood franchise, and the other modifications of the Crescent franchise, and ask you to glance through that?

A. That is one of them, I know what they are, all I have to do is to glance at them, these are what you are referring to?

Q. Yes, those folders I have just handed you contain numerous contracts do they not in which the film rentals [fol. 2511] under the franchise were adjusted downward?

A. That is correct, all at the same date, weren't they, Mr. Wright?

Q. No?

A. I think so for each year.

Q. And on July 17, 1940, it appears you made adjustments downward with respect to exhibitions in Guthrie, Kentucky, Hartselle, Alabama, Huntingdon, Tennessee, Lake City, Tennessee, Manchester, Tennessee, Rockwood, Tennessee, Rogersville, Tennessee, Russellville, Alabama, and Tracy City, Tennessee, and on the same date that was apparently evidenced by a letter agreement signed by Mr. Stengel and you of that date, and on the same date adjustments were made downward of rentals for pictures in Alabama City, Alabama, Bowling Green, Kentucky, Brownsville, Tennessee, Clarksville, Tennessee, Cleveland, Tennessee, Columbia, Tennessee, Decatur, Alabama, Dyersburg, Tennessee, Gadsden, Alabama, Gallatin, Tennessee, Greenville, Tennessee, Harriman, Tennessee, Hopkinsville, Kentucky, Maryville, Tennessee, Kingston, Tennessee, Paris Tennessee, Springfield, Tennessee and Union City, Tennessee, evidenced by this letter agreement signed by Mr. Sudekum and by you?

A. That adjustment was all granted on the same date regardless of how the final agreements are written.

Q. Yes, I undersand?

[fol. 2512] A. That is what I meant, Mr. Wright.

Q. That was all represented here, was it?

A. That is what I meant, regardless of the final agreement, regardless of how the final agreements are written.

[fol. 2513] Q. And another series of adjustments were made on both franchises, pursuant to modifications made September 15, 1938?

A. The following year, there was one in each year for two years.

Q. Well, in any event, whatever the adjustments are, they appear in those books here?

A. That is right.

Mr. Wright: The only thing that has been previously identified, I believe, and offered as repeat run options, which are contained in these books, I would like now to offer in evidence each of the folders.

The Court: All right, let them be marked.

The Clerk: Collective Exhibits Nos. P-40 and P-41.

(Recess.)

Mr. Wright:

Q. Mr. Morgan, I believe you testified that this franchise enabled you to get pictures into the other small towns, in addition to Spruce Pine, Rockwood, Manchester and Guthrie, Kentucky?

A. Yes sir.

Q. Were new theatres to be built there?

A. I can't hear you.

The Court: He said, he couldn't hear you.

[fol. 2514] Mr. Wright:

Q. Do you know when, or what theatres were operated in, say, Guthrie, Kentucky, prior to the time you made the franchise?

A. No, I don't recall, Mr. Wright.

Q. You don't know how long they had been there?

A. No, I don't recall.

Q. The same thing is true with respect to Manchester, isn't it?

A. I don't recall the exact dates. I mentioned in my testimony some of those towns as open and closed, some years we were in and out.

Q. You don't have any definite information on that at all, do you?

A. No sir.

Q. You don't know how long Spruce Pine had been there, do you?

A. No. I knew Taylor, the fellow we had sold to.

Q. You knew the theatre had been operated there?

A. My memory there is just that one year, just that contract.

Q. Your recollection is that the theatre was in operation only one year before you——

A. That is right.

Q. Before you made the Rockwood franchise?

A. That is right.

[fol. 2515] Q. I call your attention to the testimony about Tim Smith and the ten or twelve pictures. Where did you get that information that he only wanted ten or twelve pictures?

A. Well, if I recall, we got the information from the salesman.

Q. That was in the letter that Mr. Pickett wrote, that was in the letter that was offered in evidence this afternoon?

A. I don't think so, I think there was some other correspondence on it. I was familiar——

Q. Can you find that correspondence?

A. There may have been some, but I was familiar with the Tim Smith matter because we had become involved with him and not wanting to do business with him and, naturally, those things came to my attention each time that he asked for pictures after that, and whether it was trouble with the salesman or whatever the matter was, it was brought to my attention, and my recollection is, that from the information I had, that he never wanted to buy more than ten or twelve pictures.

Q. You couldn't refer us to any salesman's report or memorandum in which that information was contained?

A. I wouldn't want to guarantee that I could.

Q. We looked at all the memoranda we could find and we couldn't find anything which indicated that fact and I just wondered if something had come to your attenion?

[fol. 2516] Mr. Waller: Well, Mr. Wright is testifying now.

The Court: Objection sustained.

Mr. Wright:

Q. You think somebody has told you that, as I understand it?

A. It is my memory; I can't recall whether it is written or oral. I know that I was very familiar with all the dealings with Tim Smith.

Q. At any rate, the information did not come from Mr. Smith, did it?

A. No, not direct.

Q. Now, the letter that you replied to that was referred to here, which you wrote, that was written by you to Mr. Unger, can you tell us what Mr. Unger's position was then?

A. He was Eastern and Southern Division Sales Manager.

Q. And you were working under him?

A. Yes sir.

Q. The general sales manager of the Company, was then and is now, Mr. Neil Agnew?

A. That is correct.

Q. And the policy of the Company, so far as affects franchises, is set by Mr. Agnew, is it not?

A. Well, I presume it is given out by Mr. Agnew; I don't know who it is set up by, it may be set by the [fol. 2517] Executive Committee, I don't know, but as General Sales Manager, he gives out whatever instructions are given as to sales or our national policy.

Q. If we had any testimony here as to what the policy of the Paramount Company was with respect to franchises, at any particular time in the last three or four years, Mr. Agnew would be the man to give it, is that right?

A. Yes sir, that is right.

Q. One thing more: Since those franchises that are now in existence with Rockwood and Crescent have been in operation, have you sold a second run deal of Paramount product to an exhibitor who was in opposition to the holders of the franchise in any of those towns?

A. No sir, I don't think we have.

Redirect examination.

By Mr. Waller:

Q. Mr. Morgan, you were asked about some adjustments that were granted by Paramount after this franchise was

executed. Was there or not an oral understanding with Crescent at or about the time the franchise was granted, or executed, I mean, in regard to possible adjustments later on?

Mr. Wright: If the Court please, I object to that. He can testify to whatever happened there, and upon which the Court might conclude there was any such *any such* [fol. 2518] understanding, but I don't think Mr. Morgan is in position to say there was or was not some outside understanding, outside of the contract.

The Court: He can relate any circumstances or facts.

Mr. Waller:

Q. Just state what you know about that, Mr. Morgan?

A. Well, here is, here are the facts. I concluded the terms of the franchise, which, as I understood it, was on the basis that New York was satisfied to take it. I am talking about, now, the film rentals. I took those figures into New York and Mr. Agnew said, "Well, we have thought it over again, and we want $5,000.00 more on our deal." I was a little bit upset because I had worked for a long time on the franchise and that meant I would have to go back. No, I telephoned Mr. Sudekum I thought the best thing for him to do was to come on into New York. And he did; he and Mr. Stengel came in and I met them for breakfast and told them about it and, I said, the executives want $5,000.00 more on the deal, and I wanted him to go for it. And he said, "Well, I would like to talk to Agnew." So we went over and saw Mr. Agnew, and Mr. Sudekum told Mr. Agnew he would go for that increase on the deal if we would be agreeable to this: That if he had had a bad year and if he satisfied me that he had had a bad year, [fol. 2519] he felt that that $5,000.00 should be waived and not added in on the deal. Mr. Agnew agreed to that arrangement. He satisfied me the first year and I think it was also the second year.

Mr. Wright: If the Court please, that Mr. Agnew agreed to it, we ought to have whatever was said on it; that is a conclusion.

The Court: Well, that is a refined matter. There isn't much difference in saying he agreed to it, and that he said, "Yes, that is all right." Go ahead.

A. As I say, he satisfied me the first year and the second year and we waived the $5,000.00 increase. But each time I discussed with Mr. Sudekum—We had a special picture each of those years that we were selling separately and that were announced after our complete line had been announced for the year. The first one was "Man with Wings," and the following year it was "Gulliver's Travels." Under the terms of the franchise with Mr. Sudekum, those pictures were in his contract. We had not been able to for-see, when we made the deal for five years, that we were going to have these two special pictures, when we made the sale to Mr. Sudekum. And he voluntarily gave me, on both of those pictures, in lieu of waiving this $5,000.00, a per-
[fol. 2520] centage on both those pictures and they earned for us $2,000.00, at least $2,000.00 more than the waived amount of $5,000.00 for both years. I think that most of that is, or a lot of that is supported in some correspondence.

Q. Have you ever had any difficulty with Crescent Amusement Company, or any of these other defendant Exhibitors, about complying with the terms of their contracts?

The Court: No, he never had any difficulty about that. It is admitted all through the record.

Mr. Waller:

Q. I will ask you, Mr. Morgan, whether or not it is a fact that Paramount has made franchises with concerns operating one or two or three or a few theatres?

A. Yes sir, I said that to Mr. Wright.

Q. There is nothing unusual about that?

A. No sir, there is not.

Q. Does the financial responsibility of the exhibitor have to be considered, when you decide whether you want to deal for more than one year?

A. Yes, definitely so.

Q. In other words, is that more important in a deal for more than one year than it is in a one-year deal?

A. Yes, it is.

[fol. 2521] Q. Is the stability of the situation an item to be considered?

A. Yes sir, it is.

Q. You were asked to identify some correspondence in regard to the modification of the repeat run clause, namely, clause 8 (e) in the franchise.

A. Yes sir.

Q. In addition to the correspondence that was submitted to you, I would like to show you a letter purporting to be signed by you, dated May 26, 1939 to Mr. J. F. Kirby, Atlanta Exchange, with copy to Mr. Sudekum, and I will ask you to read that letter and say if you wrote that letter.

A. Yes sir.

Mr. Waller: I would like to have that marked as Defendant's Exhibit No. 104.

(Letter so filed and marked.)

Q. I also show you a draft of a modification of this repeat run clause dated May 25, 1939 and will ask you if you recall that this draft was enclosed with your said letter of May 26th.

A. Yes sir, I believe this is the one.

Mr. Waller: I would like to have that identified as Defendant's Exhibit No. 105.

(Letter so filed and marked.)

[fol. 2522] Mr. Waller: Now, I offer them both in evidence and they are as follows:

"New York, May 26th, 1939.

Mr. J. F. Kirby, Atlanta Exchange.

Sudekum Riders

DEAR MR. KIRBY:

"In regard to the two signed riders you sent in from Crescent and Rockwood Circuits, there were some errors in the way these riders had been made up, and therefore, I am herewith attaching 6 copies of both riders rewritten. Will appreciate it if you will forward them to Kermit Stengel and ask that these be signed in place of the ones submitted.

"Kermit inserted a clause in both riders that Paramount would definitely agree to make prints available within the 90 day period. Naturally, we will always

use every effort to have prints available, but we cannot be pinned down to one certain booking date. Therefore, the clause has been rewritten to protect us in case we cannot fill the first dates submitted.

"I am sure these changes will be all right.

Sincerely yours, Oscar A. Morgan.

cc—Miss P. E. McGrau, Messrs. H. F. Wilkes, Tony Sudekum."

[fol. 2523] "May 25, 1939.

Paramount Film Distributing Corporation, 1501 Broadway, New York, N. Y.

GENTLEMEN:

It is hereby agreed that the agreement between us dated July 28th, 1938 as of November 1st, 1937, covering theatres in the States of Alabama, Kentucky and Tennessee, and all riders thereto, be amended by adding to Article EIGHTH, subdivision (e) of said agreement the following as though the same were originally contained therein:

"With respect to each theatre licensed hereunder the Exhibitor shall notify Paramount in writing of its election to exhibit any feature photoplay for repeat exhibition at such theatre not later than thirty (30) days after the conclusion of the initial exhibition of each such feature photoplay at any such theatre, and such repeat exhibition shall be held within ninety (90) days from the conclusion of the initial exhibition of such photoplay. It is agreed that Paramount will endeavor to have prints on each such feature photoplay available for booking by the Exhibitor for such repeat exhibition during the aforesaid ninety (90) day period, provided however, if no such prints are available for such repeat exhibition on the booking dates submitted by the Exhibitor, then the Exhibitor shall submit other booking [fol. 2524] dates during the aforesaid ninety (90) day period for such repeat exhibition when prints shall be available. If the Exhibitor shall fail to so notify Paramount in writing of its election, then and in such event, upon the expiration of thirty (30) days following the conclusion of the initial exhibition of such photoplay the Exhibitor's license to exhibit such photoplay for a

repeat exhibition shall thereupon forthwith terminate and rever- to Paramount and Paramount may license the exhibition of such photoplay when and where desired by it.

'If the Exhibitor shall have elected as aforesaid to exhibit for repeat exhibition any photoplay and shall fail to so exhibit such photoplay within the aforesaid period of ninety (90) days, the license fee for each such photoplay shall thereupon forthwith become due and payable to Paramount and the Exhibitor's license to exhibit such photoplay for repeat exhibition shall forthwith terminate and rever- to Paramount and Paramount may license the exhibition of such photoplay when and where desire- by it without accounting to or crediting the Exhibitor for any sums received therefor.'

As herein modified, the aforesaid agreement and all riders thereto shall be and remain in full force and effect and is hereby ratified and confirmed.

Kindly signify your agreement hereto by signing underneath the words "Agreed to" at the bottom of this letter.

Very truly yours, Crescent Amusement Company,

[fol. 2525] By —— ——.

Agreed to:

Paramount Film Distributing Corporation,
By ——.——".

Q. Now, Mr. Morgan, refreshing your recollection from that letter of May 26th that you wrote, is it true or not that you had on that date received the riders dated May 25th, 1939 properly executed by the Crescent Amusement Company and Rockwood but with a clause in there that you wanted changed?

A. Yes, that is right.

Q. I now show you a memorandum or copy of a memorandum dated July 31, 1939 addressed to Mr. Irving Cohen with copy to Mr. Stengel, among others, and I will ask you if you made that memorandum?

A. Yes sir, I wrote that.

Mr. Waller: I would like to have that identified as Defendant's Exhibit No. 106, and I offer that in evidence.

(Letter so filed and marked)

The letter is as follows:

"Mr. Irving Cohen: Oscar A. Morgan 7/31/39.

Sudekum Rider

Regarding the attched riders that we requested Sudekum to sign and which they did not feel they should sign unless we guaranteed delivering the prints, I have [fol. 2526] discussed this very thoroughly with them, and I believe it can now be settled on this basis:

That they agree to such repeat exhibition within 120 days after conclusion of first run, and we definitely agree to supply the prints.

If this is agreeable and if you will draw the rider along these lines, I will send it to Mr. Wilkes to have it signed.

Oscar A. Morgan.

cc-Messrs. H. F. Wilkes, J. F. Kirby, Kermit Stengel."

Q. I next show you a letter addressed to Mr. H. F. Wilkes, dated August 24, 1939—well, withdraw that. It doesn't show that it went to you, Mr. Morgan.

Now, after the rider was received by you on May 26, 1939 was a re-draft sent back to Crescent but bearing the same date and was it then that you had this correspondence in regard to the obligation of Paramount to furnish the print if Crescent elected to repeat the picture?

A. You mean correspondence with Crescent?

Q. Yes sir.

A. Well, yes sir, correspondence and talks with them. I think I went to Nashville.

Q. Now, was Mr. Stengel contending that if he was obligated to pay for the picture then you ought to be obligated to furnish the print?

A. That is what he contended.

[fol. 2527] Q. Is that what the discussion was about?

A. Yes sir, and that is why he wrote ninety days in the rider that he sent back.

Q. State whether or not, aside from that question, the terms of the rider had been agreed upon prior to May 25th, 1939?

A. Yes sir, they had.

By the Court:

Q. Had been agreed on to play within ninety days or one hundred and twenty days?

A. They had been agreed upon to play within ninety days. As I explained to Mr. Wright this morning, when we advised Crescent that we wouldn't allow that clause to remain in the rider, it was settled by extending the time to a hundred and twenty days.

Mr. Waller: I would like to pass to your Honor this rider as sent to Crescent on May 26th, 1939 and let your Honor compare it with the rider as it actually appears in here so that your Honor can see just what the differences are.

The Court: All right. Let me see them.

What is the significance that is attached by the Government, if any, to the difference in the execution dates on this rider?

Mr. Wright: I don't think there is any particular significance in the dates of execution except to show that a longer period actually elapsed before they made this correction [fol. 2528] than the date which appears on the rider as it is incorporated in the franchise. I think that it is important to show exactly the date on which the agreement was finally made. I don't think there is any significance in the fact that the agreement was made at a later date and given an earlier date.

The Court: Well, I just wanted to know.

By Mr. Waller:

Q. Now, Mr. Morgan, is there anything in the repeat run clause as originally contained in the franchise here, as modified, which says that pictures repeated by Crescent will be booked to Crescent before they will be booked to a competitor of Crescent with whom a second run contract has been made?

By Mr. Wright: Now, if the Court please, the clause speaks for itself. He is just asking what that clause was, and it is obviously improper.

By Mr. Waller:

Q. Well, is there anything in any franchise which means to you or has ever meant to you as district manager at

Atlanta that pictures repeated by Crescent would have to be booked to Crescent before they would be booked to a competitor who might have a definite second run deal?

Mr. Wright: That is objected to.

[fol. 2529] The Court: Yes; sustained.

Mr. Waller: Well, they are contending that the contract was so construed, as I understand it, by the branch manager. I want to ask the district manager if he so construes it, your Honor.

The Court: Well, possibly he don't understand your question. I understand that you are asking him if the contract was ever construed by the company to prevent it from selling any certain year's product to a competitor of Crescent for second run before that repeat run had been booked on that picture by Crescent. Is that correct?

Mr. Waller: I don't know whether your Honor caught exactly what I have in mind or not. What I have in mind is this: Let's take Gadsden, for example. The Crescent Amusement Company at Gadsden has a large downtown theatre, the Princess. Then it has a couple of second run houses in downtown Gadsden. Then there is a neighborhood theatre over in Alabama City and then there is this Dixie Theatre, which is a neighborhood theatre over in East Gadsden. Now, let's say that the Dixie Theatre has a third run contract and the Princess Theatre wants to repeat a picture, is there anything in this repeat run clause that would [fol. 2530] mean that the Princess Theatre could repeat that particular picture before the Dixie over in East Gadsden would play the third run?

The Court: Well, I think the contract speaks for itself. I don't think there is anything to prevent that.

Mr. Waller: Well, I misunderstood——

Mr. Wright: In addition to that, we think, if your Honor please, the testimony in the record is that is precisely the way Paramount pictures played there. You recall first run in the Princess and then another run over in Alabama City, and then the big picture was repeated at the Capitol.

The Court: Well, the East Gadsden theatre, as I recall, interpreted a subsequent run to mean third run.

Mr. Wright: Well, they testified that with respect to Warner and Paramount, which has the second run option. All that they could get was fourth run unless the option was not exercised to repeat in the second run downtown house.

Mr. Waller: There is no such testimony, your Honor. He testified that he treated it as fourth run because Alabama City played before him.

[fol. 2531] Mr. Wright: Well, that is right.

Mr. Waller: There is no testimony that the repeat run clause had anything in the world to do with it. Mr. Wright has objected to that.

Mr. Wright: Well, look at the record then.

Mr. Waller: We will guarantee it came from Mr. Wright and not from the witness. In other words, your Honor——

The Court: Well, if Crescent had first run in Gadsden with the option of re-run or repeat performance, and then they sold second run to Alabama City and a subsequent run to East Gadsden, why wouldn't that be fourth run?

Mr. Waller: It would be; I mean if you treat Alabama City as a part of Gadsden, it would be; we don't deny that.

The Court: Well, it is part of Gadsden, isn't it?

Mr. Waller: Yes.

Mr. Raftery: A repeat run is just exactly what your Honor has stated in the Warner contract, and the Warner contract will confirm what the witness has stated as the in-[fol. 2532] dustry's idea of a repeat run. Now, the Warner franchise is in evidence and it describes a repeat run with a little more accuracy than this report does.

The Court: Well, what I want to know—what is all the argument about anyway?

Mr. Waller: I think the argument is this: Here is a very innocent provision that Crescent shall have the right to repeat a picture. Now, the Government says that if the Crescent repeats a picture that Paramount is precluded from making a second run contract with a competitor, and we say that is not so. We say that Paramount can make a second run contract with a competitor and if it does so it can book these pictures to the second run account before it is required to book them to Crescent. In other words, Crescent plays a picture once, then the second run account plays it and then Crescent repeats it, so Crescent would really be third run.

Mr. Wright: We are perfectly willing to argue that construction of it at the appropriate time.

The Court: Does a construction of the document in the light of the facts show that such instance has ever been recorded so far?

[fol. 2533] Mr. Waller: The contrary has never been recorded. In other words, there have been occasions where Paramount has not sold second run pictures to some competitor but it has not been because of the repeat run clause. It has been for other good and sufficient reasons.

The Court: All right.

Mr. Waller: I don't know whether the question has been answered or the objection sustained or what.

A. I never answered it. I know that.

The Court: Well, I don't think he ever answered it. I don't know whether he knows what the question is now or not, or the reporter or the Court either one.

[fol. 2534] Mr. Waller:

Q. Let me ask you this, Mr. Morgan: has it ever been your construction of the repeat run clause, before or after it was modified, that you would be required under it to permit Crescent to repeat a picture before you could let the second run play the same picture in the same town?

A. That is——

Mr. Wright: Now, if the Court please, that is entirely improper; if the question ever came up in a lawsuit on a contract, as to what they did or did not permit Crescent to do: Mr. Morgan couldn't go on the stand and testify as to what they did or did not permit them to do as evidence of what they did or did not do.

The Court: He can recall his construction of it; as I recall there is a letter in the record from him or some one where he has already construed it; I don't know whether his construction at this time will be at variance to that or not, but we will hear his construction.

Mr. Wright: If your Honor please, we have a contract, and the terms of the contract control.

[fol. 2535] The Court: Well, go ahead and answer it.

A. No, there was never any such construction on the clause that would ever prevent us from selling and delivering pictures on a specified run if we cared to sell it; in fact, that is a fact in East Gadsden, because we were obligated.

Mr. Wright:

Q. Just a minute; that is not responsive to the question here.

A. Well, the Judge asked me to answer.

The Court: Go ahead.

A. The point I want to make, Judge, is that Paramount has a contract in East Gadsden and the contract is marked as a specific run, and we are obligated under that contract and all the parties under it to deliver each picture on that specified run; and Mr. Wright can object to that, if he wants to; but I would like to clarify this other interpretation, apparently, to the repeat question: he could repeat as many times as he wanted to in East Gadsden; and the theater in East Gadsden is certainly positive proof that we can sell a second run regardless of that repeat clause.

The Court: Do you have a contract for second run in East [fol. 2536] Gadsden?

A. No; I don't know how that contract reads; I think it reads third run.

Mr. Waller: I think we have a second run and third run contract and probably there is a fourth; I assume that is true; it doesn't make any difference which it is; if there is a definite run, then the exhibitor can get the picture,——

The Court: Well, whether there is a first run, second run or a third run, all of them are subject to the repeat clause in the contract?

Mr. Waller: No, sir.

The Court: Well, on a definite run, they are subject to repeat pictures, if they want to?

Mr. Waller: Who has priority on a contract of that kind——

Mr. Wright: Wait a minute; this is purely argument on Mr. Waller's part. I am perfectly willing to argue the construction of the clause with him, but I object to Mr. [fols. 2537-2538] Morgan participating in the argument. I think that subject should be alone in the hands of the counsel and not the witness.

Mr. Waller: I think Mr. Wright has testified on that subject so many times, your Honor, that I think your Honor has got an erroneous impression.

The Court: I don't know whether it is from Mr. Wright testifying or from Mr. Morgan arguing.

A. I don't know, either.

Mr. Waller:

Q. Well, let me ask you this, Mr. Morgan: In your letters Mr. Wright is referring to, were you undertaking to give a construction of what would be practical, or what would be legal in a certain situation?

The Court: Well——

Mr. Wright: Well, merely to save argument, if the Court please, I object.

Mr. Waller: That is all.

And further this deponent saith not.

[fol. 2539] BENJAMIN KALMENSON, called as a witness in behalf of the Defendants, he having been first duly sworn, testified as follows:

Direct examination.

By Mr. Armistead for Defendants:

Q. Is this Mr. Benjamin Kalmenson?

A. Yes, sir.

Q. Where do you live, Mr. Kalmenson?

A. I live in Mount Vernon, New York.

Q. Have you been in the moving picture business for a number of years?

A. Been in the moving picture business for the last 14 years.

Q. What company, if any, are you now connected with?

A. I am with Vitagraph, Incorporated.

Q. How long have you been with Vitagraph, in your present position?

A. Since December, 1937.

Q. What is your present position?

A. I am Western and Southern Salesmanager.

Q. Now, what territory does that cover, Mr. Kalmenson?

A. It comprises the territory that we designate as everything west and south of Chicago.

Q. Well, do you have occasion from time to time to travel [fol. 2540] that territory?

A. I spent the equivalent of 35 to 40 weeks in that territory last year.

Q. Mr. Kalmenson, in the latter part of 1939, did you make a trip to Nashville, Tennessee, and if so, for what purpose?

A. I believe it was in November, 1939, that I visited Nashville, Tennessee, for the purpose of making a deal with Mr. Sudekum.

Q. Of the Crescent Amusement Company?

A. Yes, sir.

Q. Now, before you came to Nashville, did you know that the Crescent Amusement Company had been buying Vitagraph's Warner product?

A. Yes, sir.

Q. Did you learn whether or not the Crescent had long term deals or were buying the product each year?

A. I knew that Crescent had been operating under a long term basis with Warner Brothers or Vitagraph.

Q. When you came to Nashville, did you contemplate discussing with Crescent a long term deal?

A. Yes, sir.

Q. Now, who was the Branch—Atlanta Branch Manager at that time?

A. Mr. R. L. McCoy.

Q. Who was the Memphis Branch Manager?

[fol. 2541] A. Mr. Ollie Williamson, Jr.

Q. Now, did you ask or instruct Mr. McCoy to meet you here in Nashville?

A. Yes, sir.

Q. Well, when you arrived here, was Mr. McCoy in the city?

A. No, sir.

Q. Did he reach Nashville later on?

A. He was to meet me on a Monday morning, and I arrived here on Sunday evening off of a plane; and when I arrived here I was informed by wire there that night or the next morning that McCoy's train was late from Dallas and he would not arrive in Nashville until late that afternoon.

Q. Now, had you met Mr. Tony Sudekum prior to that time?

A. I had never met Mr. Tony Sudekum prior to that time.

Q. Now, the next morning—I believe it was Sunday afternoon when you arrived in Nashville?

A. Sunday night.

Q. Sunday night. Now, Monday morning did you 'phone Mr. Sudekum for an appointment?

A. When I found that McCoy wouldn't meet me until late in the afternoon, I telephoned Mr. Sudekum and told him McCoy was delayed and I might come to see him myself.

Q. Did you go to see him?

A. Yes, sir.

[fol. 2542] Q. Did you know that the Sudekum long term deal was about to expire?

A. The long term deal under which he was operating was about to expire, I believe, on or about December 30, 1939.

Q. 1939?

A. Yes, sir.

[fol. 2543] Q. 1939?

A. Yes, sir.

Q. Now then when you went down to see Mr. Sudekum, did you discuss and endeavor to get him to purchase Warner's product?

A. Yes, sir.

Q. Did you gentlemen agree on terms?

A. Yes, sir.

Q. Was Mr. Stengel present when you and Mr. Sudekum were discussing the purchase of films by Crescent?

A. Yes, sir.

Q. What kind of a deal was that, Mr. Kalmenson, were you endeavoring to get, a flat rental deal or a percentage deal or what?

A. I was endeavoring to get a deal which I believe it would be the best deal for my company, whether a percentage, where I thought it was the best in my opinion, with the advice that I could get, or a deal for flat rentals where I believed that was the best.

Q. As a result of that interview, state whether or not a deal was made, composed of rentals and percentages in some instances, percentages in some instances and flat rentals in others?

A. Yes, sir.

[fol. 2544] Mr. Wright: Now may it please the Court, I think that deal is in evidence.

The Court: Is there any question about that?

Mr. Wright: It is obvious the best evidence of what the deal was is the contracts, the deal itself.

Mr. Armistead: It has not been introduced, Your Honor, but to save time——

The Court: If there is no question about it, why ask about it, if it did provide for that, provide for both.

What do you say about that, did it provide for both?

A. Yes, sir.

Mr. Armistead:

Q. Getting back to this long term deal, did Mr. Sudekum, when you arrived here, had he at that time purchased the 1939-40 Warner product with the entire season?

A. His long term deal expired mid-stream in that season, our releasing season was about from October first and his deal with us permitted him to apply the contract to our releases to December 20th, I am not sure about the actual date.

[fol. 2545] Q. You did make a deal with Crescent?

A. Yes, sir.

Q. For what period of time?

A. For the balance of 1939 season, plus three years.

Q. In other words, a three and a half year deal?

A. Practically a three and a half year deal, practically yes, sir.

Q. Practically?

A. There had been more product than that.

Q. When you were making that deal with Mr. Sudekum for Crescent, did he at any time state to you that he would not make, he did not want to make the deal for Crescent unless you made a similar deal for Rockwood and its affiliates?

Mr. Wright: Obviously I think we ought to have testimony just what the conversation was, I do not think he ought to be led to that extent, what he stated.

The Court: Did you have any conversation in that respect?

A. No, sir.

Mr. Armistead:

Q. Did you have any conversation in that respect in regard to Muscle Shoals?

A. No, sir.

Q. At that time did you know Louis Rosenbaum?

[fol. 2546] A. I did not.

Q. After you made the deal with Crescent—by the way, how long did it take you—well strike that out; now after you made that deal with Crescent, did you discuss with Stengel a deal with Rockwood?

A. We agreed to the terms that we would follow generally with both Mr. Sudekum and Mr. Stengel at the same time.

Q. Was that for Crescent?

A. For Crescent and Rockwood, the discussion was such that everybody agreed to all the provisions, and we agreed generally and we had to do some detail work to break it down individually afterwards.

Q. Did Mr. McCoy come down?

A. Mr. McCoy came down that afternoon.

Q. Did you ask him to come?

A. Yes, sir, he came in that afternoon, as I said.

Q. And the next Tuesday did you continue to discuss with Mr. Stengel the details of this deal?

A. After I was convinced that we could make a deal, after Mr. Sudekum and Mr. Stengel agreed, and after we generally agreed I telephoned my head office in New York and asked him as to both the terms and the time.

Q. I will ask you if—I will ask you this; was there any agreement made between you representing Warners and [fol. 2547] Mr. Sudekum, representing Crescent, and Stengel representing Rock ood and affiliated companies, was any agreement made that is not contained in the contract between those companies and Warners?

A. No, sir.

Q. Was there any agreement made or attempted to be made by Mr. Sudekum whereby Warner would agree to or would keep product away from the opposition?

A. No, sir.

Mr. Wright: If the Court please, the agreements that were made speak for themselves.

The Court: He says other than that agreement.

Mr. Wright: It is incompetent on its face, and certainly with respect to any agreement.

Mr. Armistead: No—other than contained in this contract.

A. Please ask it again.

Mr. Armistead:

Q. Was there any agreement other than contained in these contracts, to keep product away from any opposition theatre?

[fol. 2548] A. No, sir.

Q. And when I say any agreement, I mean between you and Crescent, or Stengel representing his company, and Warners?

A. No, sir.

The Court: Did you have any kind of understanding to that effect?

A. Never had any discussion.

The Court: No discussion?

A. No discussion whatsoever.

Mr. Armistead:

Q. Now I am just going to pick out at random one of the contracts—by the way there were a number of separate contracts made were there not, that is for each individual situation?

A. Yes, sir.

Q. I notice in one of these contracts it says this:

> "Exhibitor shall have the right to repeat any feature at the lowest allocated rentals, subject to all runs and clearances which may now exist or may hereafter be granted to other exhibitors in Harriman, Tennessee—this is the Harriman contract—and in such event the [fol. 2549] exhibitor's commitment to exhibit all features in the lowest rental classification shall be reduced accordingly."

Is that in all these contracts where you have the agreement referred to?

A. Yes, sir.

Mr. Armistead: By the way, may it please the Court, the first page of this exhibit has not been put in, I mean under this long term deal has not been put in the record, and there is a whole lot of printed matter on there, Mr. Wright I take it, I took it up with him this morning, and he agrees instead of putting every separate contract, putting this to each contract, we thought the best thing to do would be to

have a photostat made of one of these as a sample and placed with this exhibit.

The Court: All right, referring to each separate contract.

Mr. Armistead: Yes, sir, we will have a photostat made and attach it on to this group exhibit.

Mr. Wright: Certainly.

Mr. Armistead:

[fol. 2550] Q. Now when you made this deal with Crescent and Rockwood, did you have any agreement or understanding with any other distributor as to the disposition or license of your films to them?

A. No, sir.

Mr. Wright: If the Court please, I do not see how that is material.

The Court: There is no charge here that they conspired with any other distributor.

Mr. Armistead: I overlooked the fact that they have withdrawn that.

[fol. 2551] Mr. Armistead:

Q. Now Mr. Kalmenson, that deal that you made with Crescent and Rockwood, did you consider that to be to the best interest of Warner to make that deal?

A. Yes, sir.

Q. When I was questioning you a while ago and asked you did you have any agreement about keeping product from any competitor, I was excepting these contracts you made, you were just selling to Crescent and Rockwood and you had your repeat run in there and you were selling your product, subject to any other——

The Court: I understood the terms about repeat run, that they are subject to any other contracts that were made with any other exhibitor.

Mr. Armistead: That is correct, your Honor, or any future contract they made with any other exhibitor.

Q. Is that correct?

A. Yes, sir.

Q. I will ask you if you left with your Branch Managers, with Crescent and Rockwood, to work out the matter of clearance?

A. I knew nothing about any of the situations involved and, naturally, I had to leave the matter of clearance entirely in the hands of our Branch Managers who knew the situations.

[fol. 2552] Q. I hand you here a letter dated March 18, 1940, which you wrote to Mr. Homer Hisey, Memphis, and asked you to look at that letter and state whether or not you wrote it?

A. Yes, I wrote it.

Mr. Armistead: We offer this in evidence as Defendant's Exhibit No. 109.

Mr. Wright: May I ask the purpose of the offer?

Mr. Armistead: It is charged by the Plaintiff, as I understand, that Crescent can compel Warner to give it terms. This letter deals with that matter of clearance and in the letter Mr. Kalmenson says:

> "I instructed McCoy to make certain that you are with him at that time as regards clearances. It is intended for Sudekum to get only the clearances that he is entitled to and none which, in your opinion, he is not entitled to."

Mr. Wright: I don't see how that letter bears on that issue. The question is, whether Sudekum got clearances he was not entitled to, not what they intended to give him. They may not have intended to give him those at all.

Mr. Armistead: The purpose is to show that Mr. Sudekum cannot make a request of Warner——

[fol. 2553] The Court: It might go to the intent. Go ahead. The question is, what he is entitled to.

Cross-examination.

By Mr. Wright, For the Government:

Q. Mr. Kalmenson, when was it that this repeat run provision was first discussed with you?

A. I believe it was discussed at the time we were working out the details of the deal.

Q. That was one of the things that was worked out at a later date, along with the clearances?

A. No, I believe it was discussed at the time we worked out the actual playing dates for the situations involved.

As near as I can recollect, I left only the matter of Clearances in the hands of the local people.

Q. When was it that the matter of wording of this repeat run option was worked out in the situations in which it was to apply, and decided upon?

A. Will you repeat that?

Q. I say, when was it that the wording of the repeat run option was worked out and the particular situations to which it would apply were designated?

A. If you are referring to the wording as it exists on the contracts now, my only part in the thing is, I take it to New York and whatever the deal is, I turn it over to the Contract Department and the Contract Department in New York decide as to the form they want to put this deal in and the [fol. 2554] wording is probably theirs. I tell them what the deal is.

Q. In any event, the wording of those is, is worked out by the Contract Department?

A. Yes sir. It covers that language. However, I tell them the exact deal we had with Sudekum and Stengel and they put it into the wording they want, whatever form they want.

Q. Mr. Hatch was your Manager of your Contract Department, wasn't he?

A. Yes sir.

Q. I believe you stated that these contracts that you made in this three and a half or four year deal, provided for the playing of a number of pictures on percentage?

A. Yes sir.

Q. When you play a number of pictures on percentage, it is necessary for you to limit the number of later runs of the features that are sold to a given situation to protect percentage revenue, is it not?

A. Will you repeat that question, please, I didn't understand it?

[fol. 2555] Q. Let's take an example here. When you have sold Crescent or Rockwood films in a first run on percentage with repeat run privilege in a town with a population, let's say, of four or five thousand, now, it is a fact, is it not, that in such a situation, in order to protect your revenue on the percentage pictures from the first run you are not going to sell more than one additional run of the feature, is that right?

A. No sir.

Q. Can you give me an example of any town in Tennessee with a population of less than five thousand where you sold first run on percentage and then licensed two more additional runs?

A. I can't give you any example of any town in Tennessee because I don't know the towns in Tennessee.

Q. Well, you aren't familiar then with exactly what the effect of this second run option privilege would be in towns for which it was sold, is that right?

A. I don't know what you mean by the second run option privilege.

Q. Repeat run option?

A. That is the part I don't understand and can't answer your question. The repeat—if you will let me explain the thing, the repeat run, as you term it——

Q. Well, that is the way it is termed here.

A. That clause in there gives, in my opinion, exhibitors the right to repeat a picture on himself in place of one of our—one of our better pictures presumably, in place of something he doesn't want to play, provided there are no [fol. 2556] other conflicting runs to keep him from doing it. It is not an option at all. It is just the privilege. I might give you an instance of where a fellow might play one of our great pictures, The Fighting 69th, and instead of playing The Case of the Black Pirate, he believes it would be more profitable to play The Fighting 69th, which he does, and it is a practice that exists all over the country.

Q. As I understand it then, if you sold second runs in one of these situations where Crescent or Rockwood has a repeat privilege, Crescent or Rockwood would still have the right to play the picture again, subject to whatever clearance terms you might have incorporated in the second run contract; that is correct, isn't it?

A. If you mean there were other runs, they could repeat behind those other runs?

Q. Yes.

A. Yes, I think so.

By the Court:

Q. Let me see if I get that straight, now. Under this contract you sell Crescent, say, The Fighting 69th in a certain town and in that town you had a contract with an independent exhibitor for second runs and that exhibitor wanted to play The Fighting 69th on a second run after

Crescent had played it first, you mean to say then that under that that Crescent couldn't show a repeat run of The Fighting 69th until after the independent had played it on second run?

[fol. 2557] A. Very definitely.

By Mr. Wright:

Q. But if both of them had that privilege, no matter how many runs they might sell, Crescent could always repeat a picture after the other run, is that right?

A. After the other run that they had or might have in accordance with the contract that at any time might exist, they could repeat after that, yes sir.

Q. Now, in small towns where your normal practice is only to sell a couple of runs, the fact that if you sell second run, Crescent could still repeat the picture for a third run in its house would tend to discourage the sale of a second run to Crescent opposition in that town, would it not?

A. It would not.

Q. It would not?

A. No.

Q. You say that your percentage revenue from the first run pictures would not be affected in any way, no matter how many other runs of the film were sold in the town?

A. We see that the set-up of our runs—there is no yardstick that I know of that applies—you are talking specifically—applies to situations generally. If you would ask me some town that had a number of runs and ask whether I believed by selling in a certain manner we would reduce our first run revenue, I might give you that, but I don't understand you.

Q. That is always one of the problems you consider in any [fol. 2558] situation where you reach a determination whether or not to sell second run, as to the effect that that additional run will have on your first run revenue where your first run has opposition, that is correct, isn't it?

A. No, not generally; at least, not with me. I try to get our pictures played first run under conditions that will get the maximum first run and attempt to get as many runs as possible. By doing that we get as much revenue as is possible.

Q. That is what I say; whether you do it or don't depends on whether the increased revenue you get from the addi-

tional runs would offset what you might lose in the way of lower receipts from the first run?

A. I don't quite understand you, Mr. Wright. There is no such thing—with the way I understand it, there is no such thing as any decrease in first run. We attempt to set up our business first run and get the maximum runs, first runs and if there are other runs, we attempt to sell them consistent with what they should produce with the particular picture you run.

Q. Now, I call your attention to a paragraph in a letter that is already in evidence here, the letter from Mr. Hatch to Mr. McCoy, dated March 8th, 1940, with which he enclosed the Stengel contracts containing the repeat run riders, and in that letter he stated that "some of the riders do not include the repeat privilege for the reason that in these towns there is opposition, according to our records." Now, have you any idea why there might have been a dis- [fol. 2559] tinction made in the application of the clause where there was and where there was not opposition?

A. I don't know what Mr. Hatch might have had in mind.

Q. Don't you think it is possible that he might have had in mind the presence of the repeat run clause in a situation where there was opposition might tend to discourage the sale of second runs to the opposition?

A. I made a deal with Mr. Sudekum and Mr. Stengel and I know what the intent of that clause is. I don't know what Mr. Hatch had in mind or what he might have tried to imply.

Q. Are you familiar with the particular competitive situation at Gadsden, Alabama?

A. No sir.

Q. You are not?

By the Court:

Q. Does everyone of the contracts that were signed with Crescent and Rockwood on this occasion that you came to Nashville, do everyone of those contracts contain this same clause relative to repeat runs?

A. I believe that everyone where only one theatre is involved—I am not sure. I would have to check them, your Honor, but I think that where Crescent had first and definite second run, where they had purchased for us first run and a definite commitment for second run, I don't think that

clause was necessary and was left off of those, but I would have to check to make sure.

[fol. 2560] By Mr. Wright:

Q. Well, you think that apparently at the time that Mr. Hatch wrote this letter in March, 1940, enclosing copies of the riders, all of the contracts did not contain the repeat run privilege? You say that is correct?

A. I said, I believe, I would have to check. In those situations where Crescent or Rockwood had contracted for a definite second run, they naturally had the privilege of playing second run, and which provided for that same thing, that clause was unnecesary. I would have to check all those contracts. I haven't seen them for a long time and I don't know what they actually contain as to every situation.

Q. Well, in any event, it is a fact, is it not, that the wording of the clause in the situations to which it was to be applied was to be worked out between the contract department and the legal department, is that right?

A. I told our contract department, and it wasn't Mr. Hatch; I deal with Mr. Sachson in New York, who was ahead of Mr. Hatch,—exactly what agreements we had made with both Mr. Stengel and Mr. Sudekum and they put it in the form that they thought was best.

[fol. 2561] Q. Well, in Mr. Hatch's letter I have just referred to, being March 8, 1941, not March 1: He says "In preparing contracts made * * * prefer not to handle this by letter or agreement rather than on an individual contract basis for each situation." Now, that suggests to you, does it not, that there was a consultation between the contract department and the legal department in the preparation of the final documents?

A. I imagine they were; as a matter of fact, I am sure of it. You mean our legal department?

Q. Yes?

The Court: Let me see that letter—the Hatch letter. (Passed to the Court.)

Mr. Wright: Oh, the Hatch letter, I read out of the record. I can hand you the record.

The Court: Well, give me the number of the Exhibit?

Mr. Wright: The exhibit number is 200.

A. Now, did I understand you to say that the clearances were worked out wholly by Mr. McCoy and Mr. Williamson

with Mr. Sudekum and Mr. Stengel, and were not discussed with you?

[fol. 2562] A. No, sir.

Q. So, you don't know anything about the clearances they got, do you?

A. They were worked out by Mr. McCoy and Mr. Williamson and Mr. Hisey, who succeeded Mr. Williamson, in between us there; they were both there.

Q. You don't know whether they got any clearance that they were entitled to or whether they did not, do you?

A. I only know that I am only charged with handling of the business in their respective territories and do know what any town in their territory should be entitled to.

The Court: How do you figure one town is entitled to clearance over any other; on what basis?

A. On the basis of whether they are in competition with each other, as to the history of the situation, all the circumstances that are involved, the admission prices, and so forth.

Mr. Wright:

Q. Now, Mr. Kalmenson, how do you determine, where you have a first run account that is playing the pictures on a percentage basis, whether you will or will not sell a second run in a town; what factors do you consider?

A. I don't know of—You see, I, naturally, in my duties [fol. 2563] in this far-flung territory that I travel,—and I have nothing but the important spots—the matters of the smaller situations are naturally handled by the local people; I have never run into that myself, and I can tell you I never myself have run into a situation where I could not sell a first and second run.

Q. You went over all the territory, is that right?

A. Yes, sir.

Q. There was a letter that was previously introduced in evidence here from Mr. McCoy to you, dated December 4, 1939, marked Government's Exhibit No. 198, which was entered under a stipulation with Mr. Armistead, that Mr. McCoy would testify that it was written by him and that it was received by you. But I will show you this letter and ask you if you received that on or about that time?

Mr. Mitchell: Is that the letter you spoke to me about?

Mr. Wright: That is the letter I spoke to you about. I will just read it into the stipulation in a moment.

A. I can't recollect having received it.

Q. You don't have any reason to believe you did not receive it?

A. Well, I have reason to believe that McCoy sent it out, [fol. 2564] and it came to New York during my absence and somebody else took care of it; I just don't remember having received it.

Mr. Wright: I spoke to Mr. Mitchell about this letter yesterday, and you will remember this was a letter at the time it was introduced in a stipulation; it refers to Muscle Shoals and Mr. Mitchell was not a party to the stipulation that was made with Mr. Armistead. Now, I again spoke to him yesterday and he has now agreed to stipulate, in so far as he is concerned, that on December 4, 1939, at the time this letter was written, Mr. McCoy was Branch Manager of Vitagraph at Atlanta, and that he wrote the letter to Mr. Kalmenson, in the course of performing his duties as such Branch Manager. That is correct, is it not, Mr. Mitchell?

Mr. Mitchell: That is correct. May it please the Court, that is done to save calling Mr. McCoy over here. He did write the letter. I admit that fact. But I don't admit the competency of the evidence.

The Court: Admitted subject to your objection for competency?

Mr. Mitchell: Yes, sir.

[fol. 2565] Mr. Wright:

Q. Now, I call your attention to the third paragraph of the letter which says: "I took up the question of the Muscle Shoals Theaters before Mr. Stengel and Mr. Sudekum and they advised me at the time that they were working out our deal, and I mentioned these towns, but Mr. Sudekum stated he did not want to include the Muscle Shoals Theaters with his franchise on account of the pending lawsuit but that he did want to work out a separate franchise the same with the other towns as with Mr. Louis Rosenbaum, to which I replied that would be O. K."

Now, you did later advise Mr. McCoy, did you not, that he should O. K. the deal worked out in accordance with Mr. Sudekum's suggestions?

A. In reply to that letter which you showed me?

Q. I say, in any event, you did authorize Mr. McCoy to work out the deal?

A. I either did, or somebody for me.

Q. To work out the deal?

A. Yes, sir.

Q. And the deal that was worked out was for the Muscle Shoals Theaters as represented by the contracts that are in evidence here, dated March 14, 1940; that is correct, isn't it?

[fol. 2566] A. Yes, sir.

Q. This Exhibit is No. 198. Now, Mr. Kalmenson, in the course of performing your duties, don't any of your Branch Managers sometimes refer to you the question of whether or not they should sell an exhibitor a second run in a town where you have a first run account; that is, in a small town?

A. The judgment of whether anything could be sold in any of the respective territory, solely rests on the part of the Branch Manager.

Q. And that question is never referred to you?

A. If it is referred to me at any time, I refer it back to him.

Q. Now, this repeat run privilege was one that was contained in a prior franchise you were operating under, was it?

A. I don't know.

Q. Do you remember any conversation you had with Mr. Sudekum and Mr. Stengel about it?

A. I knew nothing about the provisions contained in any previous deal with Mr. Sudekum.

Q. Well, can you remember what was said by Mr. Sudekum or Mr. Stengel to you in connection with this repeat run clause?

A. I can't remember exactly what the conversation was; [fol. 2567] but if they requested such a clause, and I saw no harm in it, I agreed to it.

Q. Did they ever tell you why they wanted it?

A. Well, I don't remember the actual conversation——

Q. I am asking you now, did they tell you why they wanted it?

The Court: Did they tell you why they wanted it?

A. I don't remember the actual conversation, but I suspected that that was what they wanted the clause for.

Mr. Wright:

Q. For what?

A. For the purpose of repeating a better picture in place of one they didn't want to play, provided we had nothing to spot on.

Q. I don't see any limitation in here confined to any particular class of pictures?

A. Naturally, you wouldn't expect a fellow to repeat, I mean in the general practice, in his business, that I know of, I wouldn't expect a fellow to repeat a picture that he hadn't done well on the first time.

[fol. 2568] Q. But where the privilege was granted he could have run anything he wanted, that is right?

A. He could have run anything he wanted, that is right, I am just telling you what the truth was as I know it.

Q. Is that all you can remember about what was said by them as to why they wanted the clause?

A. Yes, sir.

Q. That is all.

Redirect examination.

By Mr. Armistead:

Q. Mr. Kalmanson, you were questioned about a letter of March 8, 1940, of Mr. Hatch to Mr. McCoy, in which mention was made of riders to some of those contracts which did not contain the repeat privilege; I will ask you if these contracts do not bear date of March 14, 1940, do you know that?

A. Do I know.

Q. There is no dispute about that.

Mr. Wright: None at all.

Mr. Armistead: There is no dispute about that.

Q. I will ask you if contracts which involve an appreciable [fol. 2569] amount of business, where the applications are for films which involve an appreciable amount of rentals, if the contracts are not referred to the legal department to be drawn up?

A. I refer them to the contract department, to take such steps as are necessary.

Q. Was it customary for the contract department to refer them to the legal department?

A. Yes, sir.

Q. You were asked by His Honor relative to clearance, what elements entered into it; I understood you to say admission prices, the opposition, whether there is any opposition in the vicinity, does the matter of the appearance of the house have anything to do with the theatre, whether it is a modern, up to date theatre?

A. I said the admission prices especially whether there is any competition, we have a situation where there is competition with each other, and film rentals of course the price, the appearance of the house is conducive to better business, and naturally the film rental is involved.

Q. You were asked about Government exhibit 198, that is a letter from Mr. McCoy under date of December 4, 1939, in which the question of making a deal with Muscle Shoals is mentioned; I understood you to say you authorized some one in your department to make a deal with Muscle Shoals, [fol. 2570] is that correct?

A. I do not remember saying that, I do not recollect that, ever having received that letter, but I expect our branch to make a deal for Muscle Shoals, as well as any other town.

Q. Was the deal made with Warner, was that a deal with Sudekum or Rockwood——

Mr. Wright: Your Honor please, I think that is a conclusion asked for on that question, that is to be drawn from all the evidence in the case. I do not think this witness could state that.

The Court: Sustained.

Mr. Armistead: I will put it this way:

Q. Was there any understanding between you and Crescent and Rockwood, that the deal made between them and Warners would be dependent on a deal made with Rosenbaum; in other words, did the question of making a deal with Rosenbaum have anything to do at all with the deal made between Warners and Crescent and Rockwood?

Mr. Wright: May it please the Court, again I think it should be determined here as to what took place.

[fol. 2571] The Court: Was there any discussion in that connection, at the time you were making the deal with Crescent?

A. Not at all, no discussion, Your Honor.

The Court: Did Mr. Sudekum ever tell you if you did not make a deal with Rosenbaum or Muscle Shoals——

A. I didn't understand.

The Court; Did Mr. Sudekum ever state to you during his discussions that if you did not make a deal with Crescent you couldn't make a deal with Muscle Shoals?

A. No such conversation at all.

Mr. Armistead:

Q. Now in regard to this repeat clause, was it unusual for an exhibitor to have a clause like that in his contract?

A. I do not think I have seen many clauses just like that.

Q. Was that clause prepared by the legal department of Warners?

A. The language that appears in thos- contracts was prepared by some one other than me. I turned my information over to the contract department.

Further deponent saith not.

[fol. 2572] The Court: Call your next witness.

Stipulation

By Mr. Armistead: Now, may it please the Court, we have a stipulation here in regard to two situations that we would like to get into the record at this time. One is at Brownsville, Tennessee. Your Honor will recall that Vitagraph sold Lawing all the 1933-34 product for the Southland theatre at Brownsville. It is stipulated and agreed that Mr. Byron Adams was Branch Manager of Vitagraph or Warners, on the Memphis Exchange, and on August 20, 1935, he was acting in that capacity, and in the usual course of his business he wrote the following letter to Mr. C. G. Lawing.

"Mr. C. G. Lawing, Southland Theatre, Brownsville, Tennessee. Dear Mr. Lawing. We are still requesting box office statements on subjects which you have played and on which we can not close our records until we receive same. It would take only a few mo-

ments of your time and eliminate a lot of work for us if you would let us have statements as soon as you finish [fol. 2573] an engagement. Will you kindly let us have statements on the following. Whiteville, Gold Diggers 6/6/7.

Whiteville, Into Your Dance	7/11-12.
Alamo, " " "	7/25-26.
Brownsville, in Caliente	6/25-26.

"We would most certainly appreciate your co-operation in the above, very truly yours,

Vitagraph, Inc., Byron Adams, Branch Manager."

We offer that in evidence as defendants' exhibit number 110.

Mr. Wright: We object to that as being wholly irrelevant to any issue in the lawsuit.

The Court: It is introduced for the purpose of showing that the relations with Lawing were not satisfactory, as they could not get him to co-operate in box office statements of receipts.

Mr. Wright: It does not show whether they could get them or not. It shows his request, a request for box office statements are being sent our every day, if we are going to try the case on box office statements, then we will cer- [fol. 2574] tainly offer some testimony to the effect that Mr. Sudekum might have been asked for admission price statements that were not forthcoming. I do not see if we get down to an issue like that, we can go out and get testimony—but it will not help the progress of the lawsuit at all.

Mr. Armistead: I just want to show it was a troublesome account.

The Court: Overrule the objection.

Mr. Armistead: On August 13, 1933, the same Mr. Adams wrote the following letter to the Southland Theatre at Brownsville, Tennessee.

"Southland Theatre at Brownsville, Tennessee; Dear Sir; We have previously written asking you to forward box office statement on the following engagement but to date have not received it.

In Caliente 7/25-26 17.50-35%

"We would appreciate your favoring us with this report by return mail.

Yours very truly, Byron Adams, Branch Manager."

I offer that in evidence as defendants exhibit 111.

[fol. 2575] Mr. Wright: Same objection.

Mr. Armistead: We understand that the same objection is made to all of this.

August 25, 1933, David Hunt, booking department, Vitagraph, wrote Lawing the following letter:

"Dear C. G. In going over your cut-off sheets, features and shorts I notice there are quite a number of pictures we have made available for you but for which you have not submitted dates.

In this list of pictures, we find such pictures as Goodbyr Agsain, Mary Stevens, etc. I do not know how you feel about it but if I were running a theatre, I would worry the Warner bookers to death until I got a date on pictures of this type.

"You do not have any shorts dated. This is strictly against our Home Office instructions since we must have short subjects dated in proportion to features. Can we count on your cooperation in submitting these dates to us on your next visit to Memphis?

Very truly yours, David Hunt, Booking Dept."

We offer this in evidence as Defendants Exhibit No. 112.

[fol. 2576] On June 19, 1935, there is an interoffice communication relative to the Southland Theatre, Brownsville, Tennessee, in which there is the following:

"In view of the fact that we have not received box office statements on the above engagements, we have estimated the overage and this amount will be added to your next shipments, C. O. D."

Said interoffice communication, a communication sent by Vitagraph or Warners to Southland Theatre at Brownsville.

We offer that as defendants Exhibit 113.

On July 3, 1933, F. Wilkerson, Branch Cashier of Vitagraph or Warners, wrote Lawing the following letter, and

when I say these letters I mean in the usual course of the business, these office employes, the branch manager of Vitagraph:

"Now why don't you send me the following box office statements—

"Brownsville, Tenn. 5/23-24 S. Music.
Alamo, Tenn. 5/24-25 D. Dogs
Whiteville, Tenn. 6/6-7 Gold Diggers.

"Do this without fail, without further delay.
Vitagraph Inc., F. Wilkerson, Branch Cashier."

[fol. 2577] Mr. Armistead: On June 4, 1935, Mr. Byron Adams, Branch Manager wrote Mr. Lawing the following letter:

"DEAR MR. LAWING:

We are again requesting box office reports on the following. You have promised numerous times to forward these statements, but to date we have not received them. We would appreciate it if you would kindly cooperate a little more on sending in statements on subjects you use, inasmuch as it necessitates a lot of unnecessary correspondence and we are entitled to this information immediately upon completion of your engagement of a subject.

Whiteville, Tenn.—Devil Dogs—5/10-11
" " —Sweet Music—5/16-17
Alamo, Tenn. —Devil Dogs—5/24-25
Brownsville, Tenn.—Sweet Music—5/23-24
Very truly yours,"

We offer that in evidence as Defendant's Exhibit No. 115.

On April 16, 1935, Adams wrote Lawing the following letter:

"DEAR MR. LAWING:

Under date of April 4-5 you played Flirtation Walk in your theatre at Whiteville, Tenn., however, to date [fol. 2578] we have not received box office report on same. Will you kindly forward this information by return mail.

Also, on Feb. 21-22 you played M. Dubarry in your theatre in Brownsville, Tenn., and so far we have not received box office report on this engagement.

We will appreciate it very much if you will give these items your immediate attention so we may complete our records.

Kind regards,"

I offer that in evidence as Defendant's Exhibit No. 116.

On March 22, 1934, W. B. Fulton, Branch Manager wrote a letter to Fred M. Jack, who at that time was District Manager of Vitagraph, as follows:

"DEAR FRED:

Referring to your letter of March 19 in which you ask me to advise you the results of my visit to Brownsville. When I was in Brownsville, Mr. Lawing had just left a few minutes before for Memphis.

I saw him in the Office and he agreed to buy our next year product for both Brownsville and Alamo provided [fol. 2579] we would let him make one contract for both towns. He only runs one picture per week in Alamo. Two other companies did this last year but I would not do it. If you think it advisable to give him one contract for both towns, I am sure that I can sell him our next year product.

I told him we would take the matter up with you. Please advise.

Very truly yours,"

I offer that in evidence as Defendant's Exhibit No. 117. On May 14, 1934——

Mr. Wright: With respect to this letter, I think it should appear that they did make a contract for both towns. What possible significance there is to this, is beyond me.

The Court: Well, I suppose it is for the purpose of showing there is no more harm in Vitagraph making a contract for two towns with an independent than it would be for Muscle Shoals to make a contract for four towns.

Mr. Armistead: If they want it out, I will withdraw it. He had been bicycling pictures between Alamo and Brownsville.

[fol. 2580] Mr. Wright: That isn't in evidence here at all. He sold the product for two towns and he played off two

towns pursuant to the contract. This is merely attempting to confuse the Court and get something into the record that doesn't belong there.

Mr. Armistead: I am not trying to confuse the Court, I never have tried to.

The Court: It is too much trouble.

Mr. Wright: Is there any evidence to that effect in the record.

Mr. Armistead: He testified to it.

On May 14, 1934, Mr. H. J. Ochs, Branch Manager, wrote the following letter *of* Mr. Jack:

"DEAR MR. JACK:

Under date of March 19 you wrote to Mr. Fulton in regard to Brownsville. He replied to same March 22 and on the 26th of the same month you stated that you would discuss this matter with him when you came to Memphis.

As I understand it, this exhibitor wants to buy one contract for Brownsville and have each picture he plays in Alamo to automatically cancel one in the former city. [fol. 258] Brownsville is running full time of four changes per week while Alamo makes only one change.

I have been given to understand he has this arrangement with other distributors. I am advised that on account of our not allowing him to do this we are experiencing difficulty in securing play dates from him in Brownsville, and that before he will sign his next year contract, we must grant this concession.

Ordinarily, I would go ahead and agree to this concession but since seeing the file on same, throught it best to consult you inasmuch as the matter has been previously brought up and there might be some special circumstances surrounding the case.

Incidentally, we are doing this for Mr. Washmon in giving him a cut-back in Trenton or Dyer for each picture played in Van Buren.

Very truly yours,"

Mr. Armistead: I offer that in evidence as Defendant's Exhibit No. 118.

On June 23, 1934, there is an interoffice communication [fol. 2582] by Byron Adams, relative to C. G. Lawing, in which it was said:

"This account had cancelled all short dates because we refused to grant a reduction. I got all dates reinstated; was unable to work out a deal for next season's product."

I offer that in evidence as Defendant's Exhibit No. 119.

Mr. Wright: What was the date of that letter?
Mr. Armistead: June 23, 1934.

I have here an interoffice communication from Byron Adams, Salesman dated August 2, 1933, relative to C. W. Lawing, Southland Theatre, Brownsville in which he says:

"You are familiar with this situation. Mr. Lawing has suspended all service. Would suggest that you endeavor to get this back as an active account on our books. He has only about five or six delinquent pictures and as these are all outstanding releases, we can see no reason why he should not be anxious to date each and every one. Secure dates on Central Airport, Elmer Great, Lilly Turner, Little Giant, Heroes For Sale, Ex Lady, Picture Snatcher, Working Man, Jimmy Dolan, Silk Express, Private Detective, Mayor Of Hell, Baby Face."

[fol. 2583] I offer that in evidence as Defendant's Exhibit No. 120.

On March 2, 1933, David Hunt, of the Booking Department of Warner's at Memphis, wrote Mr. Lawing a letter, in which he says this:

"Dear C. G.:

We have just received a letter from Mr. Moray, our General Sales Manager for Short Subjects, wherein he severely criticized us for allowing delinquencies in the dating of shorts, especially in view of specific instructions not to allow any exhibitor to pass up certain proportion of their contracted obligations and selecting the other. Frankly, this practice, we are sure you will agree, is a one-sided affair and one in which we are asking for your cooperation in correcting.

As per your commitment, you are, as of February 25th, 1933, twenty-eight (28) reels of shorts delinquent and we ask that in appreciation of our splendid product we are delivering and also as a personal favor to me that you arrange to send these dates to us in addition to the other dates to prevent any delinquencies when "42nd Street" becomes available to you.

C. G., as you know, all bookers, having been one your-[fol. 2584] self, have a hard time getting exhibitors to date their short subject service, in proportion with their feature service. This practice, as stated above, is in no way news to you, however, we received a letter this morning from Mr. Jack, our General Sales Manager, stating that before we should be able to accept a date on "42nd Street" that all prior releases on features, trailers and shorts had to be dated.

It so happens that he didn't state that we had to have these played and dated before "42nd Street" so if you will submit to me all the short subjects dates that you can possibly spare in addition to your regular arrangement—two reels each Monday—I will greatly appreciate it.

Sincerely yours,

I offer that letter in evidence as Defendant's Exhibit No. 421.

On October 15, 1935, there is an interoffice communication, from Arthur Saxson, from the Home Office, to Memphis, in which it is said, referring to the Brownsville situation—No, referring to the Alamo situation:

"Dear Mr. Adams:

[fol. 2585] "Our records indicate that during W. E. 8/10/35 the item listed below represent sharing engagement for which daily receipts and a supplementary contract has not been received:

Alamo—Alamo, Tenn.
In Caliente—8/7-8

Please enter your explanation at the side of one copy retaining the other for your files. If a letter has been written to the exhibitor please attach a copy of your last communication hereto and return.

Very truly yours, Arthur Sachson, Contract Department.

P. S.: This account is the worst in the territory for sending in box office reports. We are trying another way now to secure same, by writing direct to his Theatre Manager. We are hoping it will work and as soon as we receive same will forward."

I offer that in evidence as Defendant's Exhibit No. 122.

(Recess.)

Mr. Armistead: I next offer in evidence as Defendant's Exhibit No. 123, a comparison of the film rental revenue [fol. 2586] derived by Vitagraph from Lawing and Crescent, for the years 1933-34, 1934-35, 1935-36, 1936-37. I see no necessity for copying all of this in the record, I can just give a summary of the figures, which will be subject, of course, to the Government's checking to see whether it is correct or not.

For the years 1933-34, Mr. Lawing paid to Vitagraph $1091.72 for Brownsville.

. . . . . .

Mr. Armistead: For the year 1934-35, he paid $764.95 or for those two seasons a total of $1856.67.

Your Honor will recall that Crescent had the product for the year 1935-36 and 1936-37, and Crescent paid Warner for the 1935-36 season $1078.75, and for the 1936-37 season $929.00, making a total of $2007.75, or $151.08 more than Lawing had paid Warner.

I don't want to withhold anything at all; That does not [fol. 2587] include the revenue that Lawing paid Warner from Alamo or from Whiteville. If you add the revenue for those two places to the revenues Lawing paid in Brownsville, Warner from those three situations did receive more than it did from Crescent.

Now, as to the Rogersville, Tennessee situation, your Honor will recall that Mr. Miller testified that he had the Warner product for his theatre for the season 1932-33 and that no sale was made for 1933-34, 1934-35 or 1935-36, that is to Miller. It was the only theatre in the town during that period. We will offer in evidence as Defendant's Exhibit No. 124, a comparison of the revenue paid by Miller to Vitagraph and that paid by Cumberland, for 1936-37. Miller had the product and he paid to Warners, or Vitagraph $1188.34. The next year Cumberland Amuse-

ment Company had the product, that is the product of that season, 1937-1938, and it paid to Vitagraph $1550.50. Of course, the Government reserves the right to check those figures to see whether they are accurate or not.

On July 20, 1935, Mr. H. J. Ochs, Branch Manager of Warner's wrote to Randall Bryan, as follows:—I under- [fol. 2588] stand the same objection is being made by the Government.

"DEAR RANDALL:

I note from your report of Wednesday July 17th, that Mr. W. T. Miller of the Palace Theatre, Rogersville, refuses to buy any product with percentage pictures.

There is a new deal on and after all we can choose our customers. Any exhibitor who doesn't want to play ball along the policies we have set for this coming year will just simply have to try to get along without us. It will be his loss.

Very truly yours,"

I offer that in evidence as Defendant's exhibit No. 125.

Mr. Wright: The effect of this exhibit, as I understand it, is this: It is in evidence that he did make a deal for 1935-36, did buy Warner's pictures. Is that right?

[fol. 2589] This relates to a period prior to the time that Hill came in, isn't it,—July, 1935? He bought one number and then it shows another number.

By the Court: Maybe he changed his mind.

Mr. Wright: I was just wondering what the significance of the letter here is in view of the fact he did change his mind.

Mr. Armistead: I wanted to give a picture of the situation there. Mr. Miller had the product for the 1932-1933 season. No sale was made for the season of 1933-1934 or for the 1934-1935 season.

The next offer in evidence is Defendant's Exhibit No. 126, which is a report from salesman R. R. Bryan, and on this report it says, relative to Rogersville, Tenn.

"This account operates two changes per week and states he does not have any open time until the new season's product is released. However, he states he promises to buy our 1936-36 product, especially if we

can sell same on a flat rental basis as he bought two companies product this season. I informed him that we must have at least ten subjects on a percentage basis and the balance on a flat rental. Requests that I call on him again within the next sixty days."

[fol. 2590] Next there is a daily report from Salesman Bryan dated December 17, 1935, which the Defendant offers in evidence as Defendant's Exhibit No. 127. On this report there is the following relative to W. P. Miller at Rogersville.

"Mr. Miller states he has been forced to reduce his show to two changes per week and will not increase to three changes before March or April and states he has all service he can possibly use until that time. This exhibitor early in the season offered to buy the 1935-1936 product on a flat rental basis but would not agree to buy any subjects on a percentage rental, therefore was unable to trade with him. He states he will offer me a split deal sometime in March."

We next offer in evidence as Defendant's Exhibit No. 128 letter from R. T. Hill to Vitagraph, Inc. at Atlanta, Georgia.

"GENTLEMEN:

"This will advise that we have started building in Rogersville, Tenn. and we will probably need your product for next year. We will appreciate it if you will see us before making contracts for this town."

And on June 23, 1936 Mr. Ochs, Branch Manager, replied as follows:

"This acknowledges your communication of the 22nd inst. advising us that you have started building a [fol. 2591] theatre in Rogersville, Tenn., and would like to discuss our product for this situation.

"We will gladly comply with your wishes and our Tennessee representative, Mr. Randall Bryan, will be in to see you the latter part of this week.

"Thanking you for the above interest shown in our product and sincerely trusting your health is daily improving, I am with kindest regards,

Very truly yours, H. J. Ochs, Branch Manager."

On September 15th, 1936 H. J. Ochs, Branch Manager, wrote Mr. Sears at the home office of Vitagraph as follows:

"In reply to your letter of the 11th inst. regarding the above circuit (That is the Hill Circuit), this is to advise that up to the present writing we have been unable to negotiate a satisfactory deal for our product.

"Both our Tennessee representatives, Mr. Randall Bryan and the writer have each made two separate solicitations, but Mr. Hill and his partners are sitting tight in regard to percentage pictures.

"Mr. Sudekum of Nashville is a 50% stock-holder of this circuit, and it is his definite instructions that no pictures are to play on percentage. Up to the present, they have been successful in negotiating flat rental contracts with Paramount, Fox and R.K.O., [fol. 2592] with the result that their immediate needs for product have been taken care of.

"At this time I wish to advise you that I am going to make a determined effort to get our product sold, if not in all the towns of this circuit, at least in those where we can."

That is Defendant's Exhibit No. 130.

On April 19th, 1937 there is a daily report from Salesman Bryan relative to W. P. Miller at Rogersville:

"Mr. Miller was in office and wanted to buy the 1937-1938 product. I advised him we would not be in a position to sell any new product until we have had our convention in May and after that time would call on him. Mr. Miller operates in competition to the Hill Circuit which we did not sell this seasons product."

That is Defendant's Exhibit No. 131.

On May 29th, 1937 there is a daily report from Salesman Bryan as follows:

"Exhibitor W. P. Miller.

"So this account 60 WF-7 features, 60 trailers and 89 V-7 Shorts with an increase of $169.50 over last seasons deal. This situation has a population of 1600 with no factories or payrolls and box office receipts

indicate that he is paying about all he can stand with an opposition theatre operated by the Hill circuit. [fol. 2593] After agreeing on deal Miller advised he would have to go Knoxville and requested I meet him there when he would sign contracts."

That is Defendant's Exhibit No. 132.

Now then, there is already in evidence Miller's application for the product, and on July 30th, 1937 there is an inter-office communication from Arthur Sachson of the contract department to Mr. Vergesslich, which is as follows:

"We are returning to you herewith without approval all copies of Contracts #9066 and 9067 covering the 1937-38 Product for the above theatre for the reason that this product has already been sold to the opposition in this town."

The theatre referred to is the Palace Theatre at Rogersville, Tenn.

We offer that in evidence as Defendant's Exhibit No. 133.

I think both of these letters are already in evidence. In any event, not to delay it any longer, on September —, 1937, Miller wrote to Vergesslich and wanted to know why he hadn't heard from him relative to his applications, and on September 6th, 1937 Mr. Miller received a letter stating that the product had been sold to the Sudekum Circuit. Both of these letters last referred to are [fol. 2594] already in evidence.

The next witness, W. J. KUPPER, being first duly sworn, testified on behalf of Defendants as follows:

Direct examination.

By Mr. Waller:

Q. Mr. Kupper, are you connected with the Twentieth Century Fox Film Corporation?

A. Yes sir.

Q. Where is your office and in what capacity are you connected with that corporation?

A. Office at 444 West 56th Street and I am western divisional salesmanager.

Q. I take it you mean New York City?

A. New York City.

Q. What is your territory?

A. The western division, which comprises three districts, the southern, midwestern and the coast districts.

Q. That includes what is known as the Atlanta district?

A. Yes sir.

Q. And that includes the State of Tennessee?

A. Yes sir.

Q. What is your responsibility and what are your duties with reference to film deals made in the Atlanta district?

[fol. 2595] A. They are submitted to me for approval or rejection.

Q. From Atlanta?

A. From Atlanta.

Q. Does your branch manager and district manager, or either of them, at Atlanta have any authority with respect to rejection or approval of film deals?

A. No, they don't. They may exercise it sometimes in individual cases but they are sent to us for final approval.

Q. Well, do they have authority to reject?

A. Yes.

Q. But not to approve?

A. That is right.

Q. How long have you held the position which you now hold?

A. I can give you the exact date, I thought you might ask that and I put it down—since August 10, 1932.

Q. Was the corporation re-organized about that time?

A. A few months prior to that.

Q. Who became the president at that time?

A. Mr. Sidney R. Kent.

Q. Had he been formerly connected with another film company?

A. I believe he was general manager, vice president and general manager of the Paramount Pictures Company.

Q. Did the two franchises with the Crescent Amusement Company, which have been referred to in this case, the current three year franchise, and the three year franchise [fol. 2596] which immediately preceded it, did they come before you for approval?

A. Yes sir.

[fol. 2597] Q. Did you approve them?

A. Yes, sir.

Q. Does your corporation have any particular policy for or against franchise with exhibitors, and by a franchise I mean a deal for more than one year?

A. I would say we have no definite policy; we will do it if we think it is economically sound and good business.

Q. Well, what elements would you consider in making that determination?

A. Well, in the long run of things, so we would get the most revenue out of any and all given situations.

Q. Well, do you consider the financial responsibility of the particular exhibitor?

A. That would have some bearing on it, and a lot, perhaps for them to fulfill that contract.

Q. Has your company made a relatively large number of franchises in this Atlanta District territory? I will confine my questions to that district.

A. We have made quite a number of them, yes, sir.

Q. Now, have those franchises been made only with circuits?

A. No, sir, they have been made with individuals, independent situations, large towns, small towns, circuits.

Q. Can you give any idea of the approximate number of franchises in this Atlanta District during the same period [fol. 2598] covered by these Crescent franchises?

A. I think we have about 400 out of a possible 2200 accounts.

Q. Are you confining yourself to the Atlanta District?

A. No, I am confining myself to Mr. Ballance's district, which is the Southern District, and which includes this particular territory.

Q. I see. Is it to the pecuniary interest of your corporation to have competition among the exhibitors or not?

A. Well, I didn't get the second word, and I would like to hear it again. What was that word?

Q. I asked whether or not it was to the pecuniary interest of your corporation to have competition among exhibitors?

A. Well, it is distinctly to our advantage to have competition in all situations.

Q. I pass you a photostat of a telegram which bears your signature, dated April 18, 1934, addressed to H. G. Ballance, Atlanta, and ask you if you sent that telegram?

A. I did.

Q. I offer that as Defendants Exhibit what?

The Clerk: 134

Mr. Waller: I will read it and then have it marked, your Honor.

[fol. 2599] (Reading:)

"Regarding Sudekum proposition irrespective of what it means to the drive if you feel that its the best thing for this company to accept proposition this year and that you cannot offset respectable amount with the opposition we will accept your judgment stop however if you feel you can promote sufficient opposition go ahead we will stand behind you advise what you intend doing unquote signed W. J. Kupper"

Q. Was that telegram sent in line with what you have stated to be to the pecuniary advantage of your corporation, namely, to have competition?

A. Yes, sir.

Mr. Wright: If the Court please, that is purely argument. I don't see how it affects the question. The telegram speaks for itself; so does his statement about the policy.

The Court: Well, it is just his idea of the situation.

Mr. Waller:

Q. Now, with reference to coercion of your corporation by the defendant exhibitors in this case to do something which is against the pecuniary interests of your corpora-[fol. 2600] tion, will you state what the relative revenue that your corporation obtains from the Crescent Amusement Company, exclusive of Nashville, and its affiliates, as compared with the total revenue of your corporation?

Mr. Wright: If the Court please, that is entirely irrelevant to any issue here.

The Court: I don't think it is relevant to any issue; as I see it, a comparison would not be the amount of revenue obtained from the Crescent but the revenue from all his contracts, whether it would be the amount he obtains from Crescent as compared to the amount he obtains from the Independents.

Mr. Waller: You mean the Atlanta District, as an example, your Honor?

The Court: Yes. I don't think that would be very definite about the situation.

Mr. Raftery: As a matter of fact, your Honor, we object to any interrogation along that line, on the proposition that there is no evidence that there is any such thing as compara- [fol. 2601] tive revenue. The witnesses have testified that all contracts are made by "horse-trading". How can you set up any formula of comparison that will help the Court in this situation where everything is so nebulous and there is nothing to compare?

Mr. Waller: Your Honor, in order that my offer may be clear, I am merely trying to show that this revenue is nothing but a drop in the bucket——

The Court: It may be but a drop in the bucket, but I think they are all anxious to get the drop.

Mr. Waller: I think so, too, your Honor. I guess the objection is sustained.

The Court: Yes.

Mr. Waller:

Q. Does your corporation derive any advantages from the franchises over and above what it derives from a one year deal in these situations where a franchise is made?

A. Well, we derive nothing more than the actual dollars and what the contract represents, but we do have a situation where we know that that contract is set up for a considerable course of years and we save considerable in the costs [fol. 2602] of selling, and things of that nature.

Q. Where you have an added step-up in revenue, is that an added advantage?

A. It would be; a franchise, I believe, carries a five per cent increase each year and has carried it in these two franchises.

Q. When you approved the franchise I previously referred to was it one of your purposes to enable the Crescent Amusement Company or its affiliates to suppress the competition of independents?

Mr. Wright: If the Court please, that is objected to as pure argument and calls for a conclusion of the witness.

The Court: Well, he can state if he had any such purpose in mind.

A. No, sir, I never did.

Mr. Waller:

Q. Are you the officer of the Twentieth Century Fox Film Corporation in New York who has the responsibility for these franchises and who is the contact man with the men in the field?

A. Yes, sir.

Q. To your knowledge, has there been any agreement or understanding between your corporation and any of these [fol. 2603] individual exhibitors, corporate or individual, to prevent competitors of exhibitors to obtain films, or choice films?

A. Nothing to my knowledge.

Mr. Wright: That is objected to.

The Court: Overruled.

Mr. Waller:

Q. Have you ever had any conversation with any other officers or employes of your corporation along that line?

A. No, sir.

Q. Are you personally acquainted with Mr. Sudekum or Mr. Stengel?

A. To the best of my knowledge, I never met Mr. Sudekum or Mr. Stengel until I walked into this court room this morning—or any of the defendants in this case.

Q. Have you ever had any correspondence with them regarding independent exhibitors?

A. No, sir, I don't believe I have ever had any correspondence with any of the defendants.

Q. In the course of your duties have you ever expressed the intention, or to your knowledge has any agent of your corporation ever approached any of the defendant exhibitors with reference to preventing independents to obtain [fol. 2604] films?

A. No, sir.

Mr. Wright: If the Court please, that is also objected to as irrelevant.

The Court: Overruled.

Mr. Waller:

Q. My attention has been called to Government Exhibit 215, Mr. Kupper, which is a letter dated February 11, 1936, purporting to be signed by you and addressed to Mr. Bal-

lance, in which the following statement is made: "We are also of the opinion that we should have a newsreel in Florence. We cannot hope to build up this unit of service unless we insist upon our newsreel in all situations, particularly in situations where franchises are requested."

Was your attention called to that language before you went on the witness stand?

A. I believe I was shown that letter last night, yes, sir.

Mr. Wright: Is this a letter that is in evidence?

Mr. Waller: Yes, Government Exhibit 215.

Q. Now, where you state or use the phrase, "Where fran-
[fol. 2605] chises are requested," what did you mean?

A. Well, to the best of my knowledge, the first time a franchise was made with that circuit, it was made because of Mr. Ballance's insistence. We had had trouble with Mr. Sudekum's circuit, or the Crescent Amusement Company, let me put it, that they and Mr. Ballance had worn himself out for weeks at a time, and he said he wanted to make it for a period of years; Mr. Ballance insisted on the franchise from Sudekum, and he asked me if I would be agreeable to it.

Cross-examination.

Mr. Wright: For the Plaintiff:

Q. Did I understand you to say that this sentence here that was read to you "We cannot hope to build up this unit of service unles we insist upon our newsreel in all situations, particularly in situations where franchises are requested," with reference to situations where franchises were requested by Mr. Ballance?

A. Well, when we are going to franchise our product, we want to franchise it as a whole; in this particular service, that unit of service was left out, and if we were going to make a franchise for a term of years all credits should be included: Mr. Ballance wanted to make the franchise.

[fol. 2606] Q. You weren't serving Mr. Ballance, he wasn't writing the service?

The Court:

Q. You stated a few minutes ago that Mr. Ballance insisted on this particular franchise himself, and in that letter where you said "where franchises were requested", did you

mean or did you have reference to the insistence of Mr. Ballance that this franchise should be made, or did you mean in the ordinary course, where a franchise would be requested of any of the parties?

A. No, sir; in this particular instance—I was close to it at that time—and in my mind, while I was writing about it, I was trying to impress upon him to get the units sold when we made the franchise.

The Court: I know, but to whom were you referring?

A. I was referring to the attempt of Mr. Ballance to get me to accept the franchise deal he wanted to negotiate with Mr. Sudekum.

[fol. 2607] Q. Now you gave some testimony here about policy with respect to franchises; did that policy undergo any changes while you held your office?

A. It definitely did in the last few months, we entered into a consent decree that we only sell five pictures at a time.

Q. Before that, do you recall any change that it underwent at or shortly after the time that the Government entered an anti-trust suit in the New York Court against your company?

A. I do not think so, we still made some contracts right up to the time the consent decree was accepted; and prior to that in some territories we never sold any franchises, it was only a matter of local management in there, whether in their judgment it was a good thing to do.

Q. Isn't it a fact that in the fall of 1938, Mr. Felix Jenkins, head of the legal department, issued instructions you were not to make franchises?

A. I do not know whether that is the date, some time after we got to discussing about a consent decree, the matter was discussed, whether we should continue or whether we should discontinue making any.

Q. This is before that, before 1938?

A. I don't know, I do not believe so, because we made [fol. 2608] some after that date, he may have said he didn't think it was a good policy, he didn't think we ought to do that, I can not recall but we have sold some dated after 1938.

Q. I understand you made them, but there was a discussion with the legal department as to the advisability of continuing the making of them, was there not?

A. I do not recall it, he might have advised that, put it up to the sales department, they formulate their own plans and policy.

Q. Isn't it a fact that just before you went into these negotiations, prior to that date I mean, you began to negotiate the current franchises, that are in effect now?

A. I can not give you the exact date, I believe Mr. Wilson can, because he was down and did the negotiating, and he can give it to you, but I imagine it was about some time, oh, I imagine it was the spring or summer.

Q. You say it is a three year contract?

A. That would carry it—if I look back I can find it. I get my Ks and my dates mixed up here, I would imagine it was some time during 1938, the latter part of 1939, perhaps, well may be the first part of 1939—the latter part of 1938, must have been prior to the finish of the prior franchises, they were talking about a renewal, or further franchises, or new franchises.

Q. And some time late in 1938 or early in 1939, you [fol. 2609] think that some one from your company advised Mr. Wilson, did they not, that the new policy of the company was not to make franchises?

A. No, sir, if we did I don't think he would have made the one he did make, but the franchises, it is a matter of record, and if he did that, I do not see how that could hold.

Q. You say you did not take any part in the negotiations of the franchise at all, is that right?

A. That is true.

Q. When was it that the current franchise was first submitted to you for your approval?

A. I can't recall the exact date, but it must have been around the period that I approved it, around the period of the year that I approved it.

Q. In any event if any of the negotiations were submitted to you, what is your best recollection?

A. Let me see if I can give it to you; that was probably some time during 1939.

Q. You can't fix it any more than the year?

A. I can't fix it, if you have any correspondence as to the acceptance of it, that would give the specific date. It must have been a matter of record.

Q. It was not brought to your attention before it was accepted by you?

[fol. 2610] *Q.* What?

Q. I say your best recollection is that it was not brought to your attention until the time you accepted it, is that right?

A. The last contract, the last franchise?

Q. Yes, by which I mean the one that is now in effect?

A. I knew Mr. Ballance was going to work on a long deal to get another franchise, because he was satisfied with the prior one and that is natural when any one is satisfied with a franchise is to let it run, and our sales organization handled them that way, they wanted renewal contracts, so I knew they were working on it.

Q. I understand that, but I would like to get this, what I am trying to get at is the time, when it was first brought to your attention with reference to the time when it was first submitted to the company, submitted to you for approval, with reference to the time it was actually approved?

A. Well it was actually approved some time before it was actually signed by our company. * * * It was ap-

[fol. 2611] proved and sent down, and I believe passed on by Mr. Sudekum or Crescent Amusement Company, and it came back to me and our general manager's desk for his signature, after some time, and it was approved and accepted by me long prior to the final signature of both parties.

Q. You are referring to Mr. Wobber?

A. Mr. Herman Wobber.

Q. It is a fact that he has the approval, that he is the man that has the final say on any franchise of the company, that the company makes?

A. Well Mr. Wobber's signature must go on all contracts, but he takes our approval or rejection, naturally I discuss it with him, and he has given a great deal of attention to our opinions, not only on discussing franchises, but other matters. We offer it and he can take it if he wants to and he can reject it. If I had a contract that I didn't think was a good one, I would probably talk to him before I even passed on it.

Q. Even if he thought it was a good one, and you recommended it to him, he would have the power to reject it?

A. He could overrule me, yes, sir.

Mr. Wright: If the Court please, we had some corre-

[fol. 2612] spondence here about this Fox franchise which

I have not been able to locate, and I would appreciate an opportunity to examine that before excusing this witness.

The Court: All right, take an adjournment until one fifteen.

Afternoon Session

Mr. Kupper, Continued.

Mr. Wright:

A. Mr. Kupper, I want to hand you a letter, copy of a letter, dated July 13, 1939, from Mr. Wilson to you, and I will ask you to read it and tell me if you received the original?

A. You mean read it out loud?

The Court: No, read it to yourself.

Mr. Wright: No, just read it. (Passed to the witness.) Just the one letter, a two page letter?

A. I am reading the second page.

Q. Beg your pardon.

A. I have read it.

[fol. 2613] Q. Did you receive it?

A. I probably did, I do not recall it at this time.

Q. I will ask to have that marked as next government exhibit. There are two pages that will have to be clipped together.

The Clerk: Government's exhibit 351.

Mr. Wright:

Q. Now after you have read it, does that refresh your recollection about the franchise instructions?

A. No, it does not, because if those instructions, they may have gone out, I do not recall them, and again I must say the franchise was written and submitted after that time and we approved it; if there were any definite instructions I would not have taken a franchise.

Q. I understand that; now you say the instructions that are referred to in the letter there did not come from you?

A. I do not know, the letter does not state where the instructions come from or from whom.

Q. That is right, I am asking you.

A. I do not recall ever sending such instructions. I may have, but I do not recall it.

Q. You may have, but do not remember it?

A. That is right.

[fol. 2614] Q. Now, I show you another letter from Mr. Wilson to you, a copy dated January 11, 1940, and ask you if you received that?

A. Well, again, I can only say that I undoubtedly received it and we probably acted favorably on it, but right now, I can't recall the time of receiving it.

Q. I will ask you to have that marked with the next Government number, as an Exhibit.

The Clerk: Exhibit No. 352.

(Said letter is dated Jan. 11, 1940 and — as follows:)

"DEAR MR. KUPPER:

In the past three years we have time and time again endeavored to secure a second run deal from Sudekum in a few of his better towns but always without success because he refused to pay more than $12.50 per picture for second run. In the last year we have secured second run booking on a picture like Jesse James but our second revenue was practically nil over the circuit as a whole.

After many solicitations we were finally able to work something out that we feel gives us a considerable amount of additional revenue that we have heretofore never enjoyed which is definitely covered for each situ-
[fol. 2615] ation on attached deal sheets at prices which we feel are in line.

This was only secured after several months of negotiations and covers second run in the following situations: Columbia, Union City, Cleveland, Greenville, Dyersburg, Morristown; Maryville, Tenn. Paris, and Murfreesboro, Tenn., Hopkinsville, Bowling Green, and Madisonville, Ky., Decatur and Huntsville, Ala.

In these particular situations, when we first went into this deal, Mr. Sudekum demanded a second run deal on a basis of ten or fifteen pictures which we refused and finally secured a commitment covering twenty-six pictures second run at prices stipulated on attached deal sheets.

Mr. Sudekum requested, in view of this commitment, that we allow him a ten percent elimination privilege in those situations where he has purchased fifty-two pictures because with this second run commitment, one that he did not have previously, it may be necessary for him to eliminate a few pictures in order to take care of this obligation.

You will recall that at the time the deal was approved, Mr. Ballance and Mr. Sudekum agreed that in [fol. 2616] those situations where he had a fifty-two picture commitment he would play fifty-two pictures and not exercise any elimination privilege even through under the terms of a general contract he would be entitled to a twenty percent elimination, so we feel that we are considerably better off in handling it in this way insofar as this circuit is concerned.

The clause that should be inserted into the body of the franchise should read something like this in the above towns:

'With the exception of Madisonville, Ky., Murfreesboro and Paris, Tenn. it is agreed that the exhibitor shall have a ten percent (10%) elimination privilege on first run contracts. Said eliminations to come from the lowest allocation.'

These deals for second run give us an additional film rental for K-7 of $6342.50 then K-8 to carry a five percent (5%) increase over K-7 and K-9 a five percent (5%) increase over K-8.

This adds a considerable amount of revenue to our deal and represents this amount of additional revenue that we have not heretofore enjoyed.

Have gone over this with Mr. Ballance and we feel [fol. 2617] that it is decidedly to our advantage to accept.

Yours very truly,"

Q. That letter does remind you, does it not, that the deal had not been finally completed until, apparently, some time in 1940?

A. No, I don't say that at all. I say that was a supplemental agreement to the original contract, which was something they asked me to consider.

Q. The original deal was then supplemented by this second run deal that was made in 1940?

A. Yes—I don't think that letter states that. That letter states, as to the franchise that was accepted some time back, I guess the 1939 deal of June or July, somewhere along there.

Q. I understand that.

A. Yes, but I would like to get it clear.

Q. There was a franchise deal that was agreed on some time in the summer or fall of 1939?

A. Yes sir, that is right.

Q. After that was agreed on, the clearance terms were later negotiated by the Branch Manager, by Wilson or Williamson?

A. Yes sir.

Q. Then, in addition, this deal for second run was also negotiated?

A. That was offered, yes sir.

[fol. 2618] Q. That was finally——

A. Agreed to.

Q. When the deal was finally put in one document, that deal was in it, is that right?

A. (No reply.)

Q. In between the time that you made the deal there in the summer or fall of 1939, and the time that this additional second run arrangement was negotiated, there were some negotiations or discussions about a repeat run option clause for the franchise, wasn't there.

A. I don't remember that. After we accepted the original terms that were submitted, I turned the mechanics of the franchise over to my assistant and to our Legal Department, to draft up a franchise. Now, there may have been, as you say, things about clearance that were corresponded upon. I know this other matter of some second run and the change of, possibly, commitments in a few towns, which that other exhibit mentions, I didn't follow through, in detail, all of those.

Q. You don't remember this matter of a repeat run option, it was not taken up with you at all?

A. It may have been, but I don't recall it. A repeat run option?

Q. Yes, option?

A. Is it a part of my contract?

Q. Repeat features to be incorporated in the franchise? [fol. 2619] A. I don't recall whether it is a part of my franchise or not.

Q. What?

A. I don't recall whether it is a part of my franchise or not.

Q. I don't think it is. As I understand it, your franchise doesn't provide it, but I wanted to find out whether negotiations for such an inclusion of such a clause in the franchise had been carried on with you?

A. I don't recall it, only there might have been through this letter, where they wanted some second runs of those releases.

Q. This letter refers to a deal?

A. That is all I know; I still don't recall receiving that letter.

Mr. Wright: I will offer these letters in evidence.

(Letters marked Plaintiff's Exhibits, respectively 351 and 352.)

Exhibit 351 is dated 7-13-1939 and reads as follows:

"Dear Mr. Kupper:

Attached hereto is the recap of the Sudekum deal, also comparative totals for each individual town. You will recall, when I discussed this deal with you when you were in Atlanta, that I did not have the comparisons broken down, but these have now been worked out. [fol. 2620] As Mr. Ballance and I explained to you while you were here, this has been a very difficult deal to close, first, because as far back as last October Sudekum wanted to start negotiations on a new deal and our instructions at that time were that we were not to enter into any franchises. We were again approached in December and we advised Mr. Sudekum that the situation had not changed any. He then felt that we did not want his business.

About ninety days ago Mr. Ballance and I talked with Mr. Stengel and Mr. Rosenbaum of the Sudekum Circuit and about two weeks later talked with them again. Immediately following Mr. Ballance talked with Mr. Sudekum and it looked for a long while as though we were going to be out of the circuit, because when we

refused to negotiate back in October and in December he entered into deals with other companies, whose product he had not bought up until that time.

After three months of wrangling, we have secured a deal that does show a decided improvement over K-6 and one that steps forward each year. We have ap- [fol. 2621] proached this deal from every possible angle and it represents the best we have been able to obtain.

In some cases where Sudekum had taken over theatres last year in one theatre town we forced the sale of 56 pictures. The sale was made somewhat late in the season and for that reason the comparison between K-6 and K-7 does not look so good insofar as those particular towns are concerned. Our commitment is worked out on a basis of 40 pictures in towns where one theatre operates. If there happens to be a second house in that town that operates only on Friday and Saturday with a western, that is not counted as a second house. In towns where two theatres operate the contract the contract is set up on a 52 picture commitment. When you take into consideration the possibilities of the Fair Trade Practice Agreement going into effect, we feel that we have a deal comparable in every way with what we have received in the past.

We will also note on the attached sheet certain towns in which Sudekum is interested or that he has recently taken over and assumed the contracts where previous deals were sold on percentage. In those particular [fol. 2622] situations heretofore, irrespective of what pictures earned, when he assumed a contract he demanded that prices be set up for that town in keeping with another situation of equal size. The big argument that we won on this deal was that, in those situations where they were completing contracts previously made, our returns on percentage pictures were taken into consideration in setting the prices for the K-7 pictures.

You will also note on the attached schedules special notations under remarks, where a theatre situation has changed, of where previously we sold 56 pictures or 52 pictures, to the effect that if they are operating only one house that is noted, or where on the previous franchise we sold 40 pictures and two houses are operating that on K-7 the set-up is on a basis of 52.

I sincerely trust that you can see your way clear to approve this franchise and will appreciate your acting on it as soon as possible, because Sudekum is holding up buying other product pending the approval or rejection of this deal. The total contract for three years represents a little better then $300,000.00. The deal [fol. 2623] means a lot to us and securing an early approval will help materially.

If acceptable we will have deal sheets prepared and forwarded to you.

Yours very truly, —— ——."

Mr. Waller: We object to that on the ground that it goes outside the scope of the direct examination.

The Court: Overruled.

Redirect examination.

By Mr. Waller:

Q. Mr. Kupper, you were questioned about the phrase contained in Government Exhibit No. 215, being a letter of February 11, 1936, to Ballance, from you, the phrase being "situations where franchises are requested". I notice that your letter of February 11, 1936 does not refer to any letter to which it is in reply. I want to hand you a letter dated January 20, 1936, from Mr. Ballance to Mr. M. B. Finkler, and ask you if you can identify that letter?

A. Of course, I don't remember the letter, but I remember some of the substance of the letter, it all ties in with the original negotiations that started from the first franchise.

Q. Who is Mr. Finkler?

[fol. 2624] A. Mr. Finkler was Manager of our Contract Department and all the contracts and the correspondence leading up to them, are submitted to him and he, through his Department, builds up the data and information for the division Managers to check over.

[fol. 2625] Q. Now, after looking at your letter of January 20th, 1936, addressed to Mr. Finkler and your letter of February 11th, 1936, addressed to Mr. Ballance, would you or not say that your letter was a reply to the letter addressed to Mr. Finkler?

A. I think pretty positively—well, I won't say positively, but I think in my own mind it must have been as I wouldn't

have taken that angle perhaps if I didn't have something to call it to my attention.

Mr. Waller: I offer this letter as Defendant's Exhibit No. 135.

The letter is dated 10-18-1934 and reads as follows:

"I would like to get the atttached deal approved as quickly as possible, as there is a political angle in it that might make it difficult for me.

"Paul Wilson recently sent in a deal for the Louis Rosenbaum towns of Florence, Sheffield, Tuscumbia and Athens, Alabama, and I wired you to reject the deal as some other elements had entered into the matter that I wanted to get clarified first.

"The towns of Tuscumbia and Sheffield are more or less the same situation as pictures that play in one town do not play in the other, as a general thing. The deal that was submitted was a fairly good one, considering the lateness in the season, but I would like to [fol. 2626] give you a picture of this situation.

"As you know, we have had a great deal of difficulty in getting the Sudekum Circuit set, and as a matter of fact, we do not yet have it set. This, in itself, does not amount to so much as I can replace this revenue pretty well in some of his towns where he has opposition, but Sudekum has stalled indefinitely owing to the fact that he bought Paramount product this year and actually does not need another major product, as he has a franchise with Warner and some kind of a working arrangement with R. K. O. The Sudekum situation is quite complicated, as we do not sell him in the town of Nashville (we sell Paramount) and all of the other distributors do sell him, with the exception of Paramount. It goes back quite a way and Sudekum feels that he was given a bad deal by Fox many years ago when we took our product away from him.

"I am not particularly worried about the Sudekum Circuit proper, but fifty per cent of the Rosenbaum Circuit is owned by Sudekum as well as fifty per cent of the Hill Circuit, and I am afraid if I start selling against him, he might influence Rosenbaum and Hill against us. I have not definitely had a break with him as yet, as we were working with him last week and have

a date to see him again the first of February, but he presents a big problem to me and I had just as soon sell away from him. When I held up the K-3 deal with [fol. 2627] Rosenbaum, I felt that I could force him into a deal for two additional years, and I am submitting herewith proposed franchise for K-4 and K-5 product. Comparing the total of the K-3 deal, which is $5,000.00 with the total of the K-4 and K-5 deals, which is $6,250.00, for each season, the deal for the two additional years represents a very nice increase.

"I would like to get an immediate approval of this. There is no chance of our securing percentage as he has never played pictures on percentage, and if a battle comes up with Sudekum and I can replace his revenue with the Sudekum Circuit proper, I want to be protected with Rosenbaum. We stand very well with the Hill Circuit and I do not think I would lose this business, but I do want to get this part of the circuit "in the bag." Please give me an answer on this as soon as possible.

Best wishes, H. G. Ballance, Sincerely yours."

Mr. Wright: I don't have any objection to it going in except I don't think he has got the attachment. I understand there was an attachment to it, a statement regarding the two year proposition. I think it all ought to go in if anything is going in.

Mr. Waller: I don't object to this copy. I haven't got the [fol. 2628] attachment. I am offering this as it is.

The Court: All right.

Mr. Waller: I call your Honor's attention to the following language in the letter: "When I held up the K-3 deal with Rosenbaum I felt that I could force him into a deal for two additional years, and I am submitting herewith proposed franchise for K-4 and K-5 product."

Q. Mr. Kupper, you were asked about Mr. Wobber's authority, I believe, in regard to contracts, and you stated that he could overrule you on the approval of a franchise, is that correct?

A. I said he could overrule me but he has never overruled me on an approved contract as yet.

Q. On what kind of contract?

A. Any contract that I approved. On some contracts—now, let's get this so we will all understand it. On some

contracts that I might want some further advise on I advise with higher people in my company and I would discuss it with him and maybe he would give me his opinion and it might change my mind and I might reject it, so that is the extent to which I would discuss contracts with Mr. Wobber that were submitted to me for my division. I might have an idea that I would like to accept and he might think otherwise and I might be governed by his greater wisdom and better judgment.

[fol. 2629] Q. Do I understand that you have never approved a contract and then been overruled by Mr. Wobber?

A. No.

Q. That never happened?

A. No. And I might add one more thing, on approved contracts—as a matter of fact, right today we give power to our salesmen, if they get the proper type of contract that we have outlined, that they can approve them right on the spot.

By Mr. Waller: Your Honor, with reference to the attachment on that letter, I don't know whether there was an attachment on the letter or not, or how it got on there. I am only offering the letter on Mr. Wright's statement—he wants the attachment to go along with the letter.

Mr. Wright: We certainly don't want it in there if there is any dispute about it not having been attached. That is the way the letter was given to us, with the attachment, by the company.

Mr. Waller: Well, I don't know anything about it, if the Court please.

The Court: Well, he doesn't dispute it. He just doesn't know.

By Mr. Wright: (To the Bailiff) Will you hand this letter to him from Mr. Finkler to Mr. Ballance, dated January 24, [fol. 2630] 1936, and ask him to read it. (Witness reads letter)

Q. I will ask you to compare that with this letter from Balance to Finkler, which has been identified as Defendant's Exhibit No. 135, dated January 20th, 1936, and ask you if this letter of January 24th from Mr. Finkler to Mr. Ballance is not the reply to the letter that you have in your hand there, Government's Exhibit No. ——

A. This is the same letter I just read.

Q. Yes sir, and you have also read the letter of January 24th from Mr. Finkler to Mr. Ballance?

A. That is right.

Q. Now, on comparison of the two, it is apparent to you, is it not, that the letter of January 24th from Mr. Finkler to Mr. Ballance is in reply to Mr. Ballance's letter of the 20th to Mr. Finkler?

A. That might possibly be but I would like to see the date of the other letter, of my letter to Mr. Ballance. If I can get that I can probably tell you.

Q. Your letter is dated February 11th.

A. Well, you can see, even Mr. Finkler states I was out of town. I was probably traveling around through the west coast for weeks at a time and Mr. Clarke at that time was even out. He was a pretty sick man at that time and sometime thereafter he died. As a matter of fact, at this time [fol. 2631] Mr. Clarke was almost out of the picture as far as carrying on the details of the work. Now, I answered this letter after I returned and reviewed probably both of these letters in all probability. I am not positive but I assume that.

Q. What probably happened was that Finkler first replied to the letter?

A. That is right.

Q. And then it was called to your attention when you came back and you wrote the other reply?

A. That is correct, in all probability.

Q. Now, in that letter of Finkler's referring—Mr. Clarke, what was his job then?

A. He was general salesmanager.

Q. The position that Mr. Wobber now holds?

A. Holds today, yes sir.

Q. And there is a reference in there to Mr. Clarke's instructions not to approve long term deals until he had been consulted?

A. That is right.

Q. And the practice is the same today, is it not, between you and Mr. Wobber as far as approval of franchises and long term deals is concerned?

A. Yes sir, and I think I so stated that on franchises or any important contract I would probably discuss it with the general salesmanager before I approve it.

Q. This Sudekum Circuit deal was discussed by you with Mr. Wobber?

[fol. 2632] A. I imagine it was unless the second franchise was taken at a time right after Mr. Clarke's death and Mr. Wobber could have not been familiar with the mechanics that had been going on. I might have discussed it with him at that.

Q. You refer to the second franchise made, the old one made in 1936?

A. Yes, sir.

Q. I am talking about the current one—that was unquestionably discussed with Mr. Wobber?

A. It probably was.

Q. By you?

A. By me.

Q. And the final approval of the deal rested with Mr. Wobber, is that correct?

A. I wouldn't say that. It was my inclination to accept that deal and I told Mr. Wobber I wanted it taken, so he probably said, go ahead or something to that nature. I don't know whether I went to him for a definite rejection. It was an important contract and I would naturally want to discuss it with him and if he had some objections I might have sustained his objections and gone back to Mr. Ballance and tried to clear them up.

Mr. Wright: I will ask to have the letter from Mr. Finkle to Mr. Ballance marked Government's Exhibit No. 353, the letter dated January 24th, 1936.

[fol. 2633] (Letter so filed and marked and reads as follows)

"Dear Mr. Ballance:

"I wish to acknowledge your letter of January 20th, accompanied by a proposed franchise for the Louis Rosenbaum Circuit.

"In view of Mr. Clark's strict instructions, we are not permitted to accept any long term contracts unless he personally approves them, therefore, I am afraid I will have to keep this matter in abeyance until he returns.

"Bill Kupper is also out of the city at the present time, but is expected back Monday, at which time I will take this matter up with him and if he deems advisable, he may communicate with Mr. Clark for the necessary approval.

"I am sorry that I cannot give you the quick action that you require in this instance and I hope you will appreciate my position in the matter."

Further this witness saith not.

[fol. 2634] The next witness, PAUL S. WILSON, being first duly sworn, testified on behalf of Defendants as follows:

Direct examination.

By Mr. Waller:

Q. Mr. Wilson, you have previously testified in this case under subpoena of the Government, have you not?

A. That is correct.

Q. You are branch manager for Twentieth Century Fox at Atlanta, Georgia?

A. That is correct.

Q. And have held that position for how long?

A. Since 1934.

Q. Are you familiar or were you familiar with and did you take part in the negotiation of the two franchises with the Crescent Amusement Company, namely, the current three year franchise and the former three year franchise?

A. That is right.

Q. Have you made a memorandum from your records in Atlanta in regard to the number of franchises that have been made through the Atlanta office with various exhibitors and listing those situations?

A. Yes, sir.

Q. Do you have that with you?

A. Yes, sir.

Mr. Waller: I offer that as Defendant's Exhibit No.

[fol. 2635] By the Court: What period of time does it cover?

Mr. Waller: That is 1936-1937 through 1942-1943, is that correct?

A. I think there are some in there that are before that.

Mr. Wright: The exhibit on its face doesn't purport to show when any of these franchises were made. It lists the

periods covered. I am not aware of the significance of the offer. It doesn't make any difference.

[fol. 2636] Mr. Waller: Well, it is offered for that purpose.

The Court: I take it it is offered for the purpose of showing that to make a franchise is not an unusual thing.

The Clerk: Being Defendant Exhibit 136.

Mr. Waller:

Q. How many franchises were made out of that office?

A. Well, over thirty with independent towns, and then different numbers with circuits that have more than two or three theaters.

Q. By independent accounts, what do you mean?

A. An exhibitor that has one theater in one town.

Q. Anything over that you would call a circuit?

A. Yes, sir.

Q. When the current franchise was negotiated, Mr. Wilson, did you come to Nashville in that connection?

A. Yes, sir.

Q. With whom did you negotiate the Crescent franchise, I mean the franchise with the Crescent Amusement Company?

A. With Mr. Sudekum.

Q. Was Mr. Stengel present?

A. Mr. Stengel was present; yes sir.

[fol. 2637] Q. And did you also negotiate a franchise with the Rockwood Amusement Company and its affiliates?

A. Yes, sir.

Q. With whom did you negotiate that franchise or franchises?

A. With Mr. Stengel.

Q. With Mr. Stengel?

A. Yes, sir.

Q. Was Mr. Sudekum present?

A. He was present at the general discussion, but the working out of the terms was separate and distinct.

Q. Are you familiar with the location of Mr. Stengel's office?

A. Yes, sir.

Q. Where is it with respect to Mr. Sudekum's office?

A. It is on the upper floor.

Q. Now, in what office did you work out the terms for the Rockwood towns?

A. Well, let me explain it this way?

Q. Yes?

A. That in the towns that were previously included in the previous franchise we agreed on the percentage of increase on those particular towns for the first year of the new franchise.

[fol. 2638] Q. Now, how many of those towns were there?

A. I don't know offhand; they are all listed in a memorandum that I made.

Q. Well, go ahead, and then I will show you the memorandum.

A. And then, after that was handled, I had to go on to Memphis. I returned the following week, and worked out with Mr. Stengel individual deals for individual towns that had not been included in the previous franchise.

Q. Now then, I will show you a three-page typewritten document, apparently a carbon copy, dated June 27, 1939, Nashville, Tennessee, filed as Government Exhibit No. 286 and ask you if you prepared that document?

A. Yes, sir, I prepared it.

Q. Under what circumstances, and for what purpose?

A. Well, it was simply a memorandum from which I was to make up deal sheets when I returned to Atlanta, because I didn't have a supply of deal sheets with me to make up the individual deal on each situation, and a tabulation of the different percentages of increase in that first year had to be figured out, and, rather than to stay in Nashville and having a supply of deal sheets sent up here, I preferred to make this memorandum for my own use to prepare them when I got back to Atlanta.

[fol. 2639] Q. Do you know how many duplicates you made of that memorandum?

A. The original and four copies.

Q. What was done with the various counterparts, do you recall?

A. One copy was given to Mr. Sudekum, one to Mr. Stengel, and I believe I took two back to Atlanta with me.

Q. Now, you will notice that the copy you have in your hand is signed on the last page?

A. Yes, sir.

Q. How is that signed?

A. Crescent Amusement Company, By Tony Sudekum.

Q. How were the others signed, if they were signed?

A. I believe the other one was signed By Mr. Stengel, and I in turn signed the two that were left with Mr. Sudekum and Mr. Stengel.

Mr. Wright: I think the memorandum itself would be the best evidence, unless it is lost and cannot be located.

Mr. Waller:

Q. Do you know where that document came from that you have in your hand?

A. I am sure it came out of our files.

Q. It was turned over to the Government out of your files?

[fol. 2640] A. Yes, sir.

Q. Do you know where the other copies are?

A. I imagine Mr. Sudekum and Mr. Stengel have them.

Q. Did you have more than one of them that was signed by anybody?

A. I believe I had two copies. Now, I may have another copy in Atlanta; I will have to check my records to be sure.

Q. In any event, do you recall that there was one signed by Mr. Sudekum and one by Mr. Stengel?

A. As well as I remember, yes, sir.

Q. Now, what was the purpose of having the two counterparts signed by the two different individuals?

A. Because the negotiations were entirely separate; first of all, we agreed first——

Mr. Wright: Just a minute, if the Court please. That is a pure conclusion.

The Court: Sustained.

Mr. Waller: I don't understand the grounds of the objection. I was trying to show that——

The Court: It is a conclusion of the witness. He can state [fol. 2641] the facts.

Mr. Waller:

Q. Well, state the facts; state what was done with regard to the negotiations and in regard to the preparation of the document and the design of the document.

A. I don't quite understand the question, Mr. Waller.

Q. After you prepared this document, did you submit it separately to Mr. Sudekum and to Mr. Stengel, and if so, why?

A. Well, again: First, in the matter of the towns that were specified with a percentage increase over the first year; they were separated first in the agreement; they were all agreed to; then the following week I worked out the individual deals with Mr. Stengel with the individual towns as they are listed on the three pages.

Q. Now, why did you include the Crescent towns and the Rockwood towns and the Rosenbaum towns in the same memorandum?

A. Because it was just simply a memorandum for me to use to prepare contracts or deal sheets that were to be different parts of the franchises.

Q. Where did you prepare the memorandum?

A. In an office right off of Mr. Stengel's office. I typed this memorandum myself.

[fol. 2642] Q. Now, were the actual agreements as executed by the parties subsequently prepared and executed?

A. Yes, sir.

Q. Mr. Wilson, is Gadsden, Alabama in your territory?

A. Yes, sir.

Q. What was the first agreement or deal between Fox and the Dixie Theater in East Gadsden?

A. The first deal was in——

Mr. Wright: The contract is in evidence, I believe.

Mr. Waller: What is the number?

Mr. Wright: I didn't get the number of it.

Mr. Waller:

Q. Well, then, to refresh your recollection, was it dated October 17, 1939, a very short while after the theater opened?

A. Yes.

Q. Who was the manager at that time?

A. When the house first opened, Jack Crawford.

Q. Did the Dixie Theater play off the pictures pursuant to that contract?

Mr. Wright: Now, if the Court please, this contract they [fol. 2643] are talking about here now isn't in evidence. We didn't offer any contract that Crawford made. I don't know what the purpose of this testimony is or what the competency of this witness is to testify about this contract, when we even haven't had a contract identified here and offered it——

Mr. Waller: I misunderstood you, Mr. Wright; I thought you said the contract was in evidence.

Mr. Wright: I thought he was referring to the one put in by Currey, I believe.

Mr. Waller:

Q. Mr. Wilson, do you have here with you a contract that was made with the Dixie Theater at the time Mr. Crawford was manager?

A. Mr. Johnson has it.

The Court:

Q. Was Mr. Rosenbaum present at the time you made this deal and prepared your memorandum there of three pages of typewritten matter?

A. Yes, sir—Not at the time the memorandum was prepared but at the time we agreed on the percentage of in-[fol. 2644] crease for each town.

Q. All right.

Mr. Waller:

Q. Now, do you have that contract, Mr. Wilson?

A. Yes, sir.

Q. Can you detach it from the folder you have it in?

A. Yes, sir. (Produces it).

Mr. Waller: I offer that contract in evidence as Exhibit F, whatever the number is.

The Court: All right; let it be marked.

The Clerk: F.15.

Mr. Waller:

Q. That contract was for your 1939-40 product, was it not?

A. Yes, sir.

The Court: 19—what, Mr. Waller?

Mr. Waller:

Q. 1939-40 product, dated October 17, 1939?

A. That is right.

Q. Second run; is that correct?

A. That is right.

[fol. 2645] Q. The arrangement being second run, Gadsden, Alabama, is available following first run at Princess Theater at Gadsden, Alabama, and 90 days in between the words "available" and "following"?

A. That is right.

Q. Did the Dixie Theater comply with that contract to play off the pictures?

A. No, sir.

Q. None of them?

A. No pictures; none whatever.

Q. And consequently, after Mr. Currey became manager did you make a new deal with him with the same theater?

A. Yes, sir; that was some time later.

Q. I take it the contract will speak for itself; but do you you recall whether if was in the summer of 1940?

A. Yes, sir, along somewhere between May—No, it was along in June or July.

Q. Is it anything unusual for theater pictures to be played after ninety days after release date?

A. No, sir. We couldn't possibly serve all the accounts only at the then 90 days release date.

Q. About how many prints of pictures do you have, on pictures you have in your exchange?

A. Thirteen prints.

[fol. 2646] Q. The others other than the best, how do they vary?

A. They vary from 6 to 8.

Q. Now, with 13 prints for the best pictures, approximately how many situations must be served?

A. We have 695 accounts with whom we are supposed to do business.

[fol. 2647] Q. Have you prepared a memorandum covering the play dates as compared with the release dates of four of your recent top-notch pictures for the purpose of showing the situation with reference to these pictures played?

A. Yes, sir.

Q. Played more than ninety days after release?

A. Yes, sir.

Q. Do you have that with you?

A. Yes, sir.

Q. Did you prepare that from your records in your Atlanta office?

A. Yes, sir.

Q. Will you produce that memorandum?

A. Yes, sir.

Mr. Waller: I offer that in evidence as defendants' general exhibit.

The Clerk: 137.

Mr. Wright: What issue is this supposed to be relevant to?

Mr. Waller: To show the fact that the Dixie Theatre in East Gadsden and other theatres play pictures more than [fol. 2648] ninety days after release date, the theatre is not being treated as badly as the Government contends.

The Court: Some second runs.

Mr. Waller: Yes, sir, and some of the first runs playing before and I understand that is second and third.

Mr. Wright: There is no contention whatever that the Dixie is being treated badly, because it is played behind East Gadsden, the only thing is holding the Dixie with East Gadsden, not because an inferior theatre, but behind the Crescent in Alabama City, this has nothing whatsoever to do with the question.

Mr. Waller: This shows that a number of first run theatres play pictures, they play first run more than ninety days after release, and I understood the Government contended there was something in that was bad for East Gadsden on the ground that it was a fourth run.

Mr. Wright: This tabulation is of no value for the purposes that it is offered, whether a picture is played a hundred and twenty days after, that may depend on when it was bought.

[fol. 2649] The Court: Yes, sir, that is a question of argument going to the weight of the evidence, isn't it, Mr. Wright?

Mr. Wright: It is a little more than that, I do not see how it is material at all, when the Woodland theatre in Nashville played a picture with reference to national release date, the only notice is with reference to a playing of a particular picture with reference to National Release date, it may have been played within ten days or may be a hundred days from release date, and it is not different as to whether it played one time or another. There — a number of factors that might determine that.

The Court: No, as far as the Gadsden situation with reference to when they play the pictures, with reference to release date, but that they were required to play behind Alabama City, regardless of release date.

Mr. Waller: Your Honor please, I would like to offer this in evidence.

The Court: All right, let it be introduced.

[fol. 2650] The Clerk: Defendants' exhibit 137.

Mr. Waller:

Q. Now, Mr. Wilson, are a number of these situations first run?

Mr. Wright: Do I understand the objection is overruled?

The Court: Yes, sir, I do not see that it is very material.

Mr. Wright: Neither do I.

The Court: I will sort the sheep from the goats in the final run.

Mr. Waller:

Q. Did you answer the last question I asked you, if a number of these situations were first run situations?

A. Yes, sir.

Q. You also have a number of others?

A. Yes, sir, in Nashville.

Q. Treatres operated by Crescent Amusement Company?

A. Yes, sir.

Q. Does Fox sell Crescent second run in Nashville?

A. Yes, sir.

[fol. 2651] Q. Do you have any time limit between the playing of a first run picture and a second run?

A. Sixty days.

Q. Why do you insist on that?

A. It is a matter of not having the second run house play pictures so close to your first run.

Q. Why?

A. To protect our revenue on the first run.

Q. You were asked a question by His Honor with reference to that three page typewritten memorandum; state whether or not the Crescent deal was negotiated downstairs in Mr. Sudekum's office, and the other one upstairs in Mr. Stengel's office?

Mr. Wright: Oh; if the Court please.

The Court: He has already stated that, that the Crescent deal was negotiated in Mr. Sudekum's office and with Mr. Sudekum and Mr. Stengel present, and at the time the deal on Rockwood was agreed upon at a later time that Mr. Stengel worked out the details with him in Mr. Stengel's office, as I recall.

Mr. Waller:

[fol. 2652] A. Is that correct?

A. Yes, sir.

Q. How many Rockwood towns were there in that old franchise? Were there just two, Tracy City and Rockwood?

A. Yes, sir.

Q. They were the only two, Rockood towns?

A. Yes, sir.

Q. Were they at that time?

A. Yes, sir.

Cross-examination.

By Mr. Mitchell:

Q. Mr. Wilson, at the time of this 1939 negotiation of this franchise, why was Mr. Rosenbaum in Nashville, was he there at your request?

A. I called him and asked him to come up.

Q. To meet you there for the purpose of discussing franchise for his company?

A. Yes, sir, and helping me again to make a franchise for Cresent Amusement Company, because he had been very helpful on the previous date.

Q. What do you mean by helpful, his friendship?

A. Yes, sir.

Q. Was it a tedious negotiation?

[fol. 2653] A. Very.

Q. Difficult?

A. Yes, sir, very difficult.

Q. Did you work a whole time, a whole day, without making any headway, without coming to any terms with Mr. Sudekum?

A. The first day, yes, sir.

Q. The whole first day?

A. Yes, sir.

Q. At the end of that day from your standpoint was the trade broken, the deal was fallen down?

A. I could see no possible chance of making a deal.

Q. That night at dinner did you in Nashville find Mr. Rosenbaum here and his family in Kleeman's restaurant?

A. Yes, sir.

Q. Did you and he discuss the matter then?

A. Yes, sir, at considerable length and after dinner he asked me if I would come up to his hotel room and talk about the matter and to pick up some loose ends.

Q. He encouraged you to continue the negotiations?

A. Sir?

Q. He encouraged you to continue the negotiations?

A. Yes, sir.

Q. Was he in the Crescent building the next morning when you went back up there for a further talk?

[fol. 2654] A. Yes, sir.

Q. After you and Rosenbaum came to terms during that session, could you come to terms during that session here in Nashville?

A. Yes, sir.

Q. Rosenbaum left town and went back to Florence, Alabama before you had completed with Sudekum?

A. Yes, sir, we had completed so far as Rosenbaum was concerned.

Q. You were completed with Rosenbaum?

A. Yes, sir.

Q. And he went on back?

A. Yes, sir.

Q. And at the time he left, he left you there still negotiating with Sudekum and Stengel?

A. Yes, sir.

Q. Rosenbaum was not even in Nashville, when you wrote up this memorandum with the three theatres on it?

A. No, sir.

Q. Those were the items, these three items, Musele Shoals, Rockwood and Crescent all on one piece of paper, did not mean he was there at the time you wrote that, that they were one deal?

Mr. Wright: Your Honor please, that is objectionable, it is argument, he has gone into details of how the paper was [fol. 2655] prepared, but it is for the Court to say what it means.

(Question read.)

Mr. Wright: It is purely leading.

The Court: I guess he is cross-examining him.

Mr. Mitchell: I am cross-examining him.

The Court: Well, overrule the objection.

Mr. Mitchell:

Q. Did you understand the question?

A. No, sir.

Q. Did you after you typed that three items there, one for Crescent, one for Muscle Shoals and one for Rockwood, on one piece of paper, did that mean to you they were one deal, or were they wholly separate deals?

A. They were wholly separate, because I had agreed with Mr. Rosenbaum on all the records to be used for the first year of the franchise.

Q. The items on there were for your convenience when you got back to Atlanta?

A. Yes, sir.

[fol. 2656] Q. You did not present that to him?

A. No, sir.

Q. You didn't ask Sudekum to sign it?

A. No, sir.

Mr. Waller:

Q. I asked you if Rockwood only had two towns, Rockwood and Tracy City, you said there were only the two cities, I will ask you if there were any other towns other than Rockwood and Tracy were mentioned downstairs in Mr. Sudekum's office?

A. No, sir, the negotiations were carried on upstairs.

Q. In other words all other towns were covered upstairs?

A. As a matter of fact they were covered a week later when I ran over to Memphis.

[fol. 2657] Cross-examination.

By Mr. Wright: For the Government:

Q. Do you know when these franchises that were listed here on Defendant's Exhibit No. 136 were negotiated?

A. No sir. It has my initials though on it.

Q. Well, those which started with the 1936-37 season were negotiated not later than 1936, that is correct, isn't it?

A. Yes, sir.

Q. Those that started with the 1937-38 season were negotiated not later than 1937?

A. So far as I remember, I would say so, yes sir.

Q. Now, may I have that letter of Mr. Wilson's to Mr. Kupper that was identified here a few minutes ago. Well,

while he is looking for that, I will ask you, Mr. Wilson, to look at the franchises in this tabulation. And you note that there are very few of those that were negotiated, beginning with the 1938-39 season, is that right?

A. Most of them included the 1938-39 season.

Q. Yes, I know, but I say, there were very few of those which were negotiated in 1938, is that right?

A. That is right.

Q. Did you receive any instructions in October, 1938 with reference to the negotiations of franchises?

A. Not that I recall.

[fol. 2658] Mr. Waller: I haven't objected to this line of inquiries but I am going to object to it now as immaterial.

Mr. Wright: He offered the tabulation of the franchises and they are here.

The Court: Overrule the objection.

Mr. Wright:

Q. I will hand you this Government Exhibit No. 351, a copy of a letter from you to Mr. Kupper, dated July 13, 1939, and ask you to read it and state if you wrote that letter on that date?

A. I don't remember the letter but if it is a copy of a letter I wrote to Mr. Kupper, then I wrote it. My initials are on the bottom of it. It is a copy, it isn't the original.

Q. Yes, that was produced by Counsel for Fox. You have no reason to believe that is not a correct copy of the letter you wrote?

A. No sir, I have no reason to believe it, no sir.

Q. Now, I will ask you to look at the paragraph there which refers to instructions received by you with respect to not selling franchises. See if that helps you to recall who gave you those instructions?

A. I don't see anything in here, Mr. Wright, in regard to instructions in regard to franchises.

[fol. 2659] Q. Read the second paragraph?

A. I don't remember those instructions.

Q. Do you remember where they came from?

A. No sir.

Q. Your memory was better at that time you wrote the letter than it is now, wasn't it?

A. Evidently there is another letter somewhere about it. If there is such a letter, or if there were such instructions issued.

Q. Well, reading that letter which you wrote at that time, you know that there were some instructions that you got with reference to not selling franchises, isn't that a fact?

A. From that second paragraph, there must have been. Now, who issued them, I don't know.

Mr. Wright: May I have the memorandum of the agreement that was made, which I think is Government's Exhibit 281, isn't it, signed by Mr. Sudekum?

The Court: No. 286.

Mr. Wright: I have it; No. 286.

Q. Now, when you prepared this memorandum, you stated that you made an original and how many copies?

A. An original and either two or three copies, I don't know which.

Q. What was done with the original?

A. I believe it was given to Mr. Sudekum or Mr. Stengel.

[fol. 2660] Q. That was signed by you?

A. Yes, sir.

Q. What was done with that copy?

A. One copy was then given to either Mr. Sudekum or Mr. Stengel and I took either one or two copies back to Atlanta with me.

Q. At any rate, you took this one back that Mr. Sudekum signed?

A. Yes, sir.

Q. At the time this was produced, there was a search made, was there not, to see whether there was another copy there signed by anybody else?

A. Not in our office, to my knowledge.

Q. If another one had been signed and brought back to Atlanta by with this one, they both would have been put in the same place, wouldn't they?

A. Yes, sir.

Q. Kept together?

A. Or, might have been filed right in the franchise file, I don't know whether—Or, if might have been destroyed after we finished making up the contract.

Q. There wouldn't be any occasion for you to destroy one and not the other, would there?

A. Not necessarily, no sir. It is just a possibility.

Q. You don't have any recollection now, as to whether the original was signed by Stengel or not?

[fol. 2661] A. No sir, I do not.

Q. And you say you did not deliver a copy of this, or you didn't have Mr. Rosenbaum sign a copy of this, either, is that right?

A. That is right.

Q. The reason that you and Mr. Sudekum exchanged the signed memorandum at the time this was prepared and given to you, was so that you would each have evidence as to what the deal was, which was reflected there, was it not?

A. What do you mean by a side memorandum?

The Court: He said, "Signed" memorandum.

A. Oh, signed. Just confirmation of the meeting of the minds on the deal.

Q. That is why you confirmed the deal that was made, you confirmed the deal to him and he confirmed it to you?

A. I didn't confirm the deal, that was just a memorandum for me to prepare the contract. I had no right to approve a contract.

Q. At any rate, you signed a copy of it and gave it to them to show that this was your agreement and your version of what the deal was, as well as his, isn't that right?

A. I wouldn't like to say. He would naturally want to have a copy of the terms.

The Court: If they were just memoranda for your personal use to prepare the deal sheets, later, why was it neces-

[fol. 2662] sary for either one of you to sign them?

A. Well, I don't know. It has just been a practice that we have always had when we made up a memorandum of a deal to have the contract made up at a later date, that we would each sign the copy that the other party took.

The Court: All right.

[fol. 2663] By Mr. Wright:

Q. I will show you copy of letter dated September 5th, 1939 from you to Mr. Jack Bloom of the Fox Film Company in New York, and ask you if you wrote that letter on that date.

A. That is right.

Q. Now, I would like to have that marked Government's Exhibit No. 354.

(Letter so marked.)

Q. The letter that I just handed you refers to the franchise and deal sheets that were made up from the memorandum identified as Government's Exhibit No. 286, is that right?

A. That is right.

Q. Then it was not until sometime in 1940, was it, that separate franchises were prepared for the Crescent Amusement Company, Rockwood Companies and the Muscle Shoals Theatres, is that correct?

A. No. They were prepared as soon as the deal sheets went in as separate franchise agreements.

Q. I misunderstood you with respect to this letter. I will read this letter. I will offer this in evidence.

Mr. Mitchell: I object to the introduction, may it please the Court, because it is irrelevant, immaterial and incompetent.

The Court: All right, let's see the letter; Rosenbaum objects.

(Letter handed to the Court.)

[fol. 2664] Mr. Mitchell: My theory is that the letter couldn't be evidence of anything. If the witness knows anything, he can recite it from the witness stand. It is not offered as impeachment because it doesn't impeach.

The Court: Let me see what the letter says first.

(Court continues reading letter.)

What does this relate to, Mr. Wright?

Mr. Wright: Well, I had asked him if that letter referred to the franchise that was made up on the date of the memorandum that was identified as Government's Exhibit No. 286. It is my understanding that the terms that are incorporated in the memorandum were then placed in one franchise. Now, they finally turn up, finally executed as three different franchises for reasons which we expect to develop.

The Court: I don't see how that reflects on that in any way.

Mr. Mitchell: It is certainly true, may it please the Court, that Muscle Shoals didn't write the letter and Sudekum didn't write the letter. It wouldn't be binding on them from any standpoint. Paul Wilson wrote the letter. It is not interested because he is here swearing. If he tes- [fol. 2665] tifies contrary to the terms of the letter the letter might possibly be used to impeach him but on the present showing it is not relevant.

By the Court:

Q. What is the D-46 you refer to?

A. That is a recap that we make to the company on every contract, into the home office. It is a regular form that we use. It is an inter-office form.

By the Court: I see that this just says that on account of the fact that Sudekum's office is working on the lawsuit that they have been unable to get the deal sheets signed and asking Mr. Bloom if he prefers to—wanted to go ahead and make up recaps now or wait until they are signed.

Mr. Wright: It refers though, if the Court please, to "the franchise"; not two franchises or three franchises but "the franchise."

The Court: I don't know whether he is talking about Mr. Sudekum's franchise or Mr. Rosenbaum's franchise or Rockwood's franchise. You might ask him what he refers to.

Mr. Wright: I asked him if he referred to the franchise deal that was contained in the memorandum which was identified as Government's exhibit No. 286 and he said it did.

[fol. 2666] By the Court:

Q. Is that right?

A. No, that is not—I mean it doesn't include all the towns, because there were three franchises made then and there; one was sent Mr. Rosenbaum, one went to Mr. Sudekum and one went to Stengel.

Q. Which one did you refer to when you wrote that letter?

A. I would imagine—I can't answer that for sure, but I would imagine it would be the one that went to the Crescent Amusement Company.

By Mr. Wright:

Q. Now, just a minute. This letter was written on September 5, 1939 and it is a fact, is it not, that one franchise had been prepared for all of the situations that are listed on your memorandum marked as Government's Exhibit No. 286?

A. Positively not.

Q. You are absolutely sure of that?

A. I am absolutely sure and positive.

Q. You are sure that on September 5th, 1939 three separate franchises had been prepared, is that right?

A. Yes sir.

Q. One for Rockwood, one for Crescent and one for Muscle Shoals?

A. Yes sir.

The Court: I overrule the objection. Let it go in for what it is worth on that point.

[fol. 2667] By Mr. Wright:

Q. Now, I will show you, Mr. Wilson, a copy of a letter written by Mr. Kermit Stengel to you, dated May 30, 1940, and ask you if you received that letter, the original of that letter on or about that date?

A. I imagine I received it. Now, what Mr. Stengel referred to, I don't know.

Mr. Wright: I would like to have that marked as Government's Exhibit No. 355.

(Letter so filed and marked.)

I will offer this letter in evidence.

Mr. Mitchell: It doesn't refer to Muscle Shoals but we object to it as hearsay and secondary evidence.

The Court: If it doesn't refer to Muscle Shoals what are you objecting for?

Mr. Mitchell: Because the Government might undertake to show it relates to Muscle Shoals.

The letter is as follows:

"Mr. Paul Wilson, Twentieth Century-Fox Film Corporation, Atlanta, Georgia.

DEAR PAUL:

[fol. 2668] "I am returning herewith, three copies of the franchise which you sent me. I have retained one

copy for my use, inasmuch as there appear to be a number of changes necessary. I also believe, because of present conditions, that two separate franchises should be executed.

"I am also enclosing herewith, two copies of comment with regard to the franchise as it is now written. I believe that you will concur with the contents of this memorandum.

"With best wishes and kindest personal regards, we are

Yours very truly, Rockwood Amusements, Inc.,
By Kermit C. Stengel.

KCS:cs. encl.

P. S. I can keep the deal sheets which are now in the copy of the franchise which I hold or I can mail them on to you. Please advise.

KCS."

[fol. 2669] Mr. Wright:

Q. In the meantime I show you two letters dated October 3rd, 1939, one from you to George Landis, Branch Manager at Indianapolis, and the other from you to Tom Young at Memphis, and ask you if you wrote those letters on the date they bear?

A. Yes sir.

Q. And I will show you letter dated October 11, 1939 from you to Mr. Landis and ask you if you wrote that letter on that date?

A. Yes sir.

[fol. 2670] Mr. Wright: I will ask that the letter be marked with the next exhibit number.

The Court: All right; let them be marked. The objection of counsel of Mr. Rosenbaum to No. 355 is overruled.

Mr. Wright:

Q. Of course, the first paragraph of this letter, about three copies of the franchise which you sent us," that franchise that you sent to Mr. Stengel was the franchise which included both the Rockwood and the Crescent situations, were they not?

A. What was the date of that letter, Mr. Wright?

Q. May 30, 1940.

A. I am sure the deal sheets and the legal document were separate, the same as they always were intended to be——

The Court: He isn't asking you about deal sheets or legal documents; he asked you if the three copies of that franchise that are referred to in that letter, were not, in fact, one franchise which included the franchise with Rockwood and the Crescent?

A. I will say I don't believe so.

Mr. Wright:

[fol. 2671] Q. I will call your attention to the statement which follows immediately after: "I also believe that because of present conditions two separate franchises should be executed." Does that help you?

A. Do I refer to what theater company?—May I see the letter. (Letter handed witness.) Really, Mr. Wright, I don't know whether that refers to Crescent or Cherokee, or what it would cover.

Q. Well, you finally prepared two separate franchises after that letter was received, one for Crescent and one for Rockwood, isn't that right?

A. Now, wait a minute: there were three franchises prepared originally; that was the agreement.

Q. Originally, yes, and one for Muscle Shoals; but that letter there refers, does it not, to splitting the franchise which you sent Mr. Stengel into two franchises—one for Rockwood and one for Crescent?

A. Now, I don't know what it refers to, because there is no——

The Court:

Q. Don't you know what you signed?

A. I sent the franchise up to be signed.

Q. Was that the franchise you sent him?

A. Yes, sir.

[fol. 2672] Q. Well, don't you know what you signed?

A. I say, your Honor, I don't know whether it was just for the Crescent towns or just for the Rockwood towns.

Q. I am asking you; don't you know?

A. No, sir, I do not.

Mr. Wright:

Q. As a matter of fact, it included both Rockwood and Crescent towns, didn't it?

A. I can't tell you, Mr. Wright; I would say, off handedly, no.

Q. Well, may be these other letters that you identified will help you on that score. Have you got those marked?—Do you have any idea what Stengel was referring to when he referred to present conditions?

A. No, sir; you will have to ask Mr. Stengel on that; I don't know.

Q. You were aware of the fact, were you not, at the time you wrote that letter, that there was a lawsuit pending, that this lawsuit was pending?

A. Yes, sir.

Q. Now, this letter you wrote on October 3rd to Mr. Landies, October 3, 1939, which has been identified as Government Exhibit No. 356, says: "Dear George;" By the way, Landis was the Manager of the Fox Exchange at [fol. 2673] Indianapolis?

A. Yes, sir.

Q. (Reading:) "While in Nashville last week working out the matter regarding clearance on the Sudekum circuit, they requested the following service," etc. Now, by "Sudekum Circuit" you referred not only to the Crescent Amusement Company but to the Rockwood Company and all of its affiliates, did you not?

A. May I see the letter, Mr. Wright?

Q. Yes, indeed. (Letter handed the witness.)

A. The towns listed in this letter are towns both of Crescent and Rockwood.

Q. And when you referred to the deal with the Sudekum circuit you were referring to the other deal with both Rockwod and Crescent towns, is that right?

A. Yes, sir.

Q. And that deal you are referring to was the deal for the franchise deal which was finally incorporated in separate agreements for Rockwod and Crescent, isn't that right?

A. Well, the deals I am referring to are the deals for the franchise, yes, sir.

Q. In the letter you wrote on the same date to Mr. Young, you say, "While in Nashville last week working out the matter of clearance on the Sudekum circuit, they requested

[fol. 2674] the following clearance and situations by your office that I would furnish you. Advise me if this is satisfactory and acceptable to you". The deal you are referring to there is for the Rockwood and Crescent towns, isn't that right?

A. Yes, sir, the same condition as in Indianapolis.

Q. That is the letter that refers to clearances for both Rockwood and Crescent towns?

A. Yes, sir.

The Court: All right; we will take a short recess at this time.

(Recess.)

Resumption after Recess:

Mr. Waller: If the Court please, in regard to the correspondence about the franchise, the facts are and we will be glad to stipulate, that the franchise which was received by Mr. Stengel covered both the Crescent and the Rockwood towns, and he requested that they be separated into two franchises. I think the witness is honestly mistaken about it; and I will be glad to make that stipulation.

The Court: All right; let it be so stipulated.

[fol. 2675] Mr. Wright: May I have the other tabulation that was identified by Mr. Wilson? (Handed him by the Clerk).

Q. This tabulation which you prepared, which has been identified as Defendants Exhibit No. 137, shows the dates when certain pictures were played in certain theatres. Will you tell me what the basis of selection of the data that is shown here was?

A. I just took four or five pictures and ran down from the booking book the dates that the pictures played in those towns on the basis of 90 days after release.

Q. You just took this information off the booking book which was in the office there?

A. Yes, sir.

Q. You don't know why any of the pictures that are shown here played on the particular date that they did play, as distinguished from some other date, do you?

A. Well, excepting that that was the date that they were booked.

Q. Yes, but the reason for their playing at this time instead of at some other time, is something you don't know anything about; is that right?

A. No, sir.

Mr. Wright: I move to strike the exhibit No. 137 from [fol. 2676] the record.

The Court: I don't think it sheds any light on the subject.

Mr. Raftery: May it please the Court, if it is going to be stricken, I want to reserve the right of offering evidence of that character, but there will be a different method of putting in in.

The Court: All right.

Mr. Wright:

Q. Do you know why this contract wasn't performed?

A. No, sir, I do not.

Mr. Wright: I move to strike Mr. Wilson's testimony about the performance of the contract.

The Court: Overruled.

Mr. Wright:

Q. Mr. Wilson, in the course of negotiating franchises, there was some—or, after the deal, after the real terms of the deal were agreed upon in the summer of 1939, you had some negotiations with reference to the possible inclusion of a repeat run clause in the franchise, did you not?

[fol. 2677] A. No, sir; that was all as part of the original deal.

Q. Well, can you—And that reference to the last paragraph of this memorandum, dated June 27, 1939——

The Court: Just a minute, Mr. Wright: In connection with your motion to strike that contract:

Q. (To witness) You said you didn't know why no pictures were being played under the contract; were any pictures ever booked by the exhibitor under that contract?

A. They were booked by the exhibitor and then cancelled.

Q. All right.

Mr. Wright:

Q. Do you know why they were cancelled?

A. No, sir, I do not.

The Court: Well, were they cancelled by the Twentieth Century Fox?

A. No, sir, they were cancelled by the exhibitor.

The Court: All right.

Mr. Wright: Q. Well, how do you know they were can-
[fol. 2678] celled by the exhibitor?

A. They were dated in and cancelled. We had no reason to cancel them.

[fol. 2679] Mr. Wright:

Q. You had—these negotiations with reference to the cancellation were carried on with you, were they not?

A. Cancellation of the dates?

Q. Yes?

A. They came into our office.

Q. You do not know whether the exhibitor cancelled because you would not serve those pictures in accordance with that contract or not, do you?

A. I assure you that was not the reason, because I then had the matter in our office.

Q. Well if you don't know the reason, you can just say you do not know?

A. I don't know it.

Mr. Waller: Will Government Counsel stipulate that Jack Crawford was subpoened as a witness and was released and sent home without being put on the stand?

Mr. Wright: Will you stipulate that Mr. Sudekum bought him an automobile just a few months before this?

Mr. Armistead: We will stipulate he let him have a hun-
[fol. 2680] dred dollars, and he bought one, he did not pay for it and they had a warrant out for him.

Mr. Wright: I will stipulate he was of no value to us as a witness.

The Court: All right, I assume that or you would have put him on.

Mr. Wright:

Q. Now this deal you are referring to for repeat runs, that which is circled in red here in the memorandum of June 27, 1939, Government's exhibit 286, which reads as follows:

"Terms for repeat runs are to be paid in addition to fifty percent of the first run, except in a case where the

fifty percent would not represent a film rental equal to the lowest allocation of any payments, the lowest allocation allocated to any picture, from the lower allocation."

That is what you are referring to?

A. All of the legal phraseology of the franchise was prepared by Mr. Ballance, he wouldn't accept that clause, and we inserted in lieu of that additional features in which he wanted to make of the contract, the franchise.

Q. In other words, no repeat clause ever got into the final [fol. 2681] franchise, is that right?

A. Yes, sir.

Q. Can you show me where that is in the final franchise?

A. Yes, sir. (Document passed to the witness.) Under section eight, on page nine.

Q. I would like to read the clause.

The Court: All right.

Mr. Wright:

"In any towns in which only one theatre operates regularly for a definite second run is not sold, the exhibitors may play off any feature picture the repeat run, but will pay therefor a license fee of fifty per cent of the original license term, and which license fee shall in no event be less than the price set forth in the lowest allocation, the exhibitors agreeing, however, that they will notify the distributor within thirty days of the last day of the first run exhibition, of their intention to put in picture as a repeat run, and further agree that they will submit exhibition dates for the showing of the picture within sixty days of the last exhibition of the first run picture on the repeat run, the exhibitors may, however, eliminate a picture from the lowest classifica- [fol. 2682] tion. It is further understood and agreed that if during the term of this franchise, a competitive theatre operates in any village, city or town listed on the attached deal sheet, they shall have a definite schedule, and the exhibitors shall not have the right to exhibit any feature motion pictures as a repeat run."

Now there is no——

The Court: Does that say where a second run is made to an opposition theatre, that the Crescent shall not have the right to have a repeat run?

Mr. Wright: No, that refers to the Franchise. I might say Your Honor, in a number of situations, a definite second run, as well as a first run, is sold to Crescent. This last paragraph here refers to those situations where only one run is sold to Crescent, with the privilege of repeating, and it says with respect to those situations:

> "It is further understood and agreed that if during the term of this franchise a competitive theatre operates in any village, city or town listed on the attached deal sheet, or (where a definite second run is not sold) [fol. 2683] that is in situations not Crescent, the exhibitor shall not have the right to exhibit any feature motion pictures as a repeat run."

Q. The last qualification provided in this does not appear in the deal that was evidenced by the agreement or memorandum of June 27, 1939; do you know it happened to be put in there?

A. Mr. Wright, I will say this, the memorandum of June 27th was a memorandum for me to make up the contract and give that information to Mr. Ballance, for Mr. Ballance might demand that the additional clause be added.

Q. Are you sure that it was not the legal department that demanded it?

Mr. Waller: That is objected to, Your Honor.

The Court: Overruleed, see what he knows about it.

A. No, sir, I really do not know how it all came about.

Mr. Wright:

Q. Well I will show you this letter of November 22, 1939, from you to Mr. Stengel, and ask you if that is a copy of a letter you wrote to him on that date? (Passed to the witness.)

A. Yes, sir.

[fol. 2684] Mr. Wright: I will ask to have this marked as the next Government exhibit.

The Clerk: Government's exhibit No. 359.

Mr. Wright: That exhibit number 359 recalls to your mind the fact that negotiations were then going on with respect to a repeat run clause, does it not?

A. No, sir, as I read the letter, it was with reference to clearance.

Mr. Waller: You offer it in evidence?

Mr. Wright: Yes.

This letter identified as Government's exhibit number 359, this is in the first paragraph:

> "Dear Kermit: This will acknowledge your letter of November 9 to which you attached a letter from Mr. Armistead relative to the clearance clause and repeat-run clause which you want to insert in the franchise. I am answering both of these questions separately.

And then the balance of the letter is devoted entirely to a [fol. 2685] discussion of clearance, and is as follows:

> "As I advised you during our telephone conversation, our attorney from New York was in Atlanta a few weeks ago to secure information to guide him in preparing our defense on the government suit. Upon his return to New York he discussed the matter with our legal department and with Mr. Kupper, and Mr. Kupper wired me, which telegram I read to you over the phone, to the effect that the clearance can not be changed or made any different from what it was in the previous year.
>
> "Then upon receipt of Mr. Armistead's letter yesterday I discussed the matter at length with Mr. Ballance, who stated that it would not be advisable to change any clearance clause in view of the instructions given us which are as follows: Under no circumstances is clearance to be changed from that granted previously. You can readily understand that changing these clauses would only mean our continuously defending lawsuits unnecessarily because any clearance that worked out satisfactorily previously should not necessitate any change.
>
> "During the term of the past deal, if my memory serves me, only once was the matter of clearance [fol. 2686] brought up and that was only because product had not been dated in that particular town in accord-

ance with the agreement that governed that clearance.

"Then, too, this year you have the availability of prints from Atlanta, Memphis, and Indianapolis which you did not have in the years past, and this gives you a freedom of booking to the extent that product can be dated in your situations as you see fit and to your best interests.

"As stated above, Mr. Ballance went over the matter at great length and looked at it from all angles and he feels that our legal department's and Mr. Kupper's position was well taken and that the matter of clearance would of necessity have to be the same as set forth in previous deals."

Q. Did you write another letter with reference to repeat run clauses?

A. I do not recall, Mr. Wright. Do you have another letter of that same date?

Q. We asked Mr. Johnson if there was one, but he was unable to find it. Have you another that he wrote to you or not?

A. No, sir, I do not.

[fol. 2687] Q. Do you recall making any other answer in the way of a telephone conversation or other discussion?

A. No sir. I imagine the letter from Mr. Armistead, the answer, I sent the *cal*use in to the Legal Department to be inserted in the franchise.

Q. You don't know what did happen?

A. No sir.

The Court: I understood you to say, in that letter, you were answering the questions separately.

A. That is what the letter says. I don't know. I must have gotten off on some other thought. I don't know.

Mr. Waller: This is objected to as outside of the scope of the direct examination. If it is a part of the Government's case in chief, it should have been put in, in chief.

The Court: Overruled.

Mr. Wright:

Q. In this matter of serving prints to exhibitors, that you testified about, Mr. Wilson, it is a fact, isn't it, that you were not always limited by the number of prints that

happened to be in the exchange at any particular time? You sometimes borrowed prints from other exchanges?

[fol. 2688] A. Yes sir.

Q. Depending on the demand in the various territories, it may be shifted from one branch to another?

A. Most of the time that applied to a large town booking.

Q. But it is done, with reference to all your booking situations?

A. Yes sir.

Mr. Wright: That is all.

Cross-examination.

By Mr. Mitchell, For Muscle Shoals:

Q. Mr. Wilson, I hand you a document which purports to be the franchise of Muscle Shoals Theatres with your Company, and attached to it, a letter purporting to have been written by you on May 8, 1940. Please examine that and see if that is a fact and say whether or not you wrote that letter?

A. Yes sir.

Mr. Mitchell: May it please the Court, I call attention to the franchise, which is in evidence or a copy of it, and this letter is attached, to the original franchise, dated May 8, 1940:

(Reading):

"Dear Louis:

"I am enclosing your copy of franchise properly executed covering the seasons 1939-40, 1940-41 and [fol. 2689] 1941-42.

"Very truly yours, Paul."

PSW:EP.

Mr. Mitchell: I offer the letter in evidence.

(Letter marked Exhibit No. 138).

In that connection I wish to call your Honor's attention to the fact that the copy of the letter from Stengel to Paul Wilson, a copy of the letter in evidence written by Paul Wilson, suggesting writing separate franchises for Crescent and Rockwood, was dated May 30, 1940.

The Court: What is the date of this letter?

Mr. Mitchell: The letter is dated May 8, 1940.

The Court: I don't think it is contended by the Government that those two franchises referred to in that letter were Rosenbaum franchises.

Mr. Wright: That is right; that has been stipulated.

Mr. Mitchell: I am glad to hear it is stipulated because I can't be certain.

Cross-examination.

By Mr. Waller:

Q. Have you heard of the Sudekum Circuit as being just the Crescent Theaters?

[fol. 2690] A. No sir.

Q. As including the Crescent Amusement Company alone, or the Crescent Amusement Company and Rockwood?

A. It has been used for years to designate the towns that operate out of the Crescent Amusement Building.

Q. Whether it is Rockwood or Crescent?

A. That is right.

Q. That Rockwood Circuit, has it got a number of different nicknames, have you heard it called the Stengel Circuit?

A. The Stengel Circuit, yes sir.

Q. Have you heard it called the Junior Circuit?

A. No.

Q. Have you heard it called the Red Network?

A. Yes.

Q. Have you heard it called the Kerosene Circuit?

A. That was in the olden days when they were in very small towns.

The Court: That is like Hobo Oil Wells?

Mr. Waller:

Q. Mr. Wilson, do all exhibitors desire to Exhibit A pictures as early as possible after release date?

A. Yes.

Q. With reference to borrowing prints, are you able to borrow those prints from some other exchange, on those best pictures?

[fols. 2691-2692] A. Most of the time we have to borrow them from our Home Offices in New York.

Q. About how many can you borrow?

A. I have never been very successful in doing that, except on the booking of a large town.

(Further this deponent saith not).

Mr. Mosby: If your Honor pleases, Universal Pictures had witnesses here for two days, and if we are not breaking into the continuity of the Crescent Defense, we would like to have the opportunity of presenting these witnesses at this time. However, we anticipated that Mr. Wilson's testimony would take the rest of the afternoon and we have let all the witnesses go back to the hotel.

The Court: Well, does Crescent have any other witnesses they can put on at this time?

Mr. Waller: Not at this time unless we put on Mr. Stengel. I was preparing to put him on tomorrow.

Mr. Mosby: We will have Universal ready in the morning; of course, we could send for them at the hotel now, if you cared to go on at this time.

The Court: It would be time to adjourn before they could get down there; it is 10 minutes after four now.

Mr. Mosby: That is what we thought. We just——

. . . . . .

[fol. 2693] The next witness, K. C. STENGEL, one of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Waller:

Q. Mr. Stengel, you are one of the defendants in this case, are you?

A. Yes sir.

Q. You are employed also by the defendant Crescent Amusement Company?

A. Yes sir.

Q. And you are connected with what other corporations that are defendants in this case?

A. Rockwood, Cherokee and Kentucky.

Q. What is your age?

A. Thirty-five.

Q. How long have you lived in Nashville?

A. Since January, 1926.

Q. Where were you born and reared?

A. Minneapolis, Minnesota.

Q. Did you attend the University of Minnesota before coming to Nashville?

A. Yes sir.

Q. For how many years?

A. About two years.

Q. Before coming to Nashville what business experience had you had, if any? I don't mean all the jobs you had but [fol. 2694] just give a brief sketch—how old were you when you started to work?

A. Ten years old?

Q. Now, just briefly sketch a few of the things you did before you came to Nashville during school vacation.

A. Well, ever since I have been, since the age of ten I have been working after school and summer vacation since—on up to the present time with the exception that I took a vacation in 1933.

Q. Now, did you ever do any work at any time that had anything to do with motion pictures?

A. Yes sir. Of course, when I was very small I threw handbills around to get a pass to the theater and then later when I was in my teens I worked in the neighborhood theatre as usher and popcorn boy, and then I worked, the last year I was in high school and during summer vacation for F. D. O.

Q. What is F. D. O.?

A. It was a film booking office, I believe was the—I think R. K. O. took over F. D. O. in a later re-organization. I worked in the posting room and I helped the booker.

Q. Now, when you came to Nashville why did you come?

A. Well, a boy friend of mine was driving some people to Florida and I was coming down during school vacation, Christmas vacation, and when I came here I heard about Caldwell & Company and all my life I had made up my mind that I wanted to get in the banking business and I had [fol. 2695] studied and read and tried to find out everything that I could about it. I thought the South was going to grow.

Q. You had read some of Caldwell & Company's advertising, had you?

A. Sir?

Q. You had read some of Caldwell & Company's advertising?

A. No, not until I got down here, but it was a well rounded investment company.

[fol. 2696] Q. Well, did you apply for a job to Caldwell & Company?

A. Yes, sir, I did.

Q. Did you get it at once?

A. No, sir, it took me nine months, but I went there two to three times a week until they gave me a job, I think, to get shut of me.

The Court: Worried them into giving you a job.

Mr. Waller:

Q. Who did you work for in the meantime?

A. Equitable Life Assurance Company.

Q. When did you leave Caldwell & Company? Was it before or after the stock market crash in 1929?

A. I started in September, 1926, and left in 1929.

Q. Now, in the meantime, had you married Mr. Sudekum's daughter?

A. Yes, sir.

Q. What was your position with Caldwell & Company when you left?

A. Assistant Trust Officer.

Q. When you were there with Caldwell & Company, had you bought any Crescent Amusement Company stock—any stock in that company?

A. Yes, sir.

[fol. 2697] Q. How many shares?

A. Twenty shares, that cost me $4,000.00.

Q. Have you still got those shares?

A. Yes, sir.

Q. How much Crescent Amusement Company stock have you got now?

A. Slightly less than fifty shares, total.

Q. When you left Caldwell & Company, what position did you take?

A. I left Caldwell & Company to go—I left Caldwell & Company and went over to Joseph Hutton & Estes, as Secretary-Treasurer of their company.

Q. Was that another investment company here?

A. Yes, sir.

Q. How long did you stay with that company?

A. Until September or October, 1932 I believe.

Q. Now, when you left there, what sort of work did you do, at first?

A. Well, I decided to free-lance. I left there because, naturally, during the depression, things were not going so well, and they cut my salary down to about $150.00 a month and I thought I could make more money doing something else.

Q. And then did you act as a stocks and bonds salesman? [fol. 2698] A. Yes, sir.

Q. And for how long?

A. Well, I free lanced for so long and then was employed by the Cumberland Securities Company as a salesman of stocks and bonds.

Q. Well, did you make a living there as a stocks and bonds salesman?

A. Yes, sir, a pretty good one.

Q. Now, when was it you went with the Crescent Amusement Company and under what circumstances?

A. Well, may I explain my answer just a little bit?

The Court: Go ahead.

A. In 1933, why, I was doing pretty good in the investment business. I told Mr. Sudekum about it, and I wanted to get in business for myself, and I didn't see any opportunity in the place I was in, and I tried one or two times to start a company in the investment business and couldn't; so finally Mr. Sudekum told me that he might get somebody in his organization: And I started with him in May, 1935.

Q. Now, did you have a definite job or definite duties when you went with Crescent at first, or what?

A. No, sir. When he hired me he told me to go back into Mr. McCarren's office that was back over there in one part [fol. 2699] of the building, to see what I could find to do.

Q. Well, did you go about learning the business there?

A. Yes, sir; I would go out with Mr. Bank, the maintenance man and try to learn something about operating the machine; and clean up the stock room and try——

Q. You said when you had been with this company out in Minneapolis, you did some sort of work in Minneapolis in regard to posters?

A. Yes, sir.

Q. Now, did you do something with reference to posters?

A. Yes, sir, both with this company and with Finkelstein & Reuben; and when I came with the Crescent Company they didn't have a poster department; they were attempting to route their paper from one department to another, and

the manager couldn't tell what particular advertising results they were going to get, and I asked Mr. Sudekum to let me start it; and he said, Go ahead and work it out.

Q. And then did you start a poster department?

A. Yes, sir.

Q. And did that result in savings?

A. Yes, sir.

Q. Have you still got that poster department?

A. Yes, sir; work five employes in it.

Q. Now, you are familiar with the Strand Enterprises? [fol. 2700] A. Yes, sir.

Q. Tell us about that.

A. Mr. Sudekum, on one of his trips to West Tennessee, one of the times, he met Mr. Haynes; I went along with him, and when he closed the deal he told me I could look after the reports as they came into the office; and I would watch the reports as they came in, to see which was taking in money, and which wasn't, and how the expenses of the theatre ran.

Q. How did you happen to get hold of this theater at Tracy City, Tennessee?

A. Mr. Sam Werner, back a number of years ago, he and Mr. Sudekum and Mrs. Sudekum were very close friends, and as I understand it, Mrs. Sudekum used to spend the summer up there; and Mr. Werner had been after Mr. Sudekum for years to start a theater up there; and finally we went up there one day and looked at the building and agreed to lease it month by month.

Q. Now, who leased that theater, you or the Crescent Amusement Company?

A. I leased the theater, and Mr. Sudekum had some portable equipment that he gave me; we put it in the theater; and used some draperies on the side walls over this sheet iron to take care of the accoustics; and that is the way that [fol. 2701] theater started.

Q. Did you make any money out of that theater?

A. Yes, sir.

Q. Now, how did the Rockwood Amusements, Inc., come into existence?

A. Well, Tracy City was operated as an individual until February 1936, at which time we acquired the Lyric Theater at Rockwood, and then we formed a corporation.

Q. And the first two theaters, then, that went together to form the corporation were the Rockwood theater and the Tracy City theater, is that correct?

A. Yes, sir.

Q. Now, what was your first experience in regard to film deals, Mr. Stengel?

A. Well, when we acquired Tracy City and Rockwood, of course I didn't know anything about operating a theater at all; and the first deal that I can remember was the Fox franchise, when Mr. Sudekum—that was in 1935, I think—told me that he had been working on a franchise, and he was going to include these two towns, and he says, These are the prices; are they all right? And, so far as I was concerned, they were all right, because I didn't know.

Q. Well, you had nothing to do with negotiating that Fox franchise in 1935?

[fol. 2702] A. No, sir.

Q. Now, you say when the Fox franchise was made with the Crescent Amusement, your two towns were included?

A. Yes, sir.

Q. And that franchise, I believe, was signed only by Mr. Sudekum.

A. Yes, sir.

Q. Now, with reference to subsequent film deals where your two Rockwood theaters were concerned, or any subsequent acquisitions of Rockwood Amusements, Incorporated, who handled the film negotiations and deals?

A. Well, the next selling season was 1936-37, at which time I negotiated my deals, subject, of course, to this one idea: that I always asked Mr. Toney at that time if the deal was all right.

Q. So far as the talks with the representatives of the distributor corporations was concerned, who had those talks, you or Mr. Sudekum?

A. I did. Mr. Toney sort of put me in the position of "sink or swim."

Q. And any advise you got was on the side from Mr. Sudekum?

A. Yes, sir.

Q. Now, what about the film deals for the Crescent [fol. 2703] Amusement Company, did you at any time commence to have anything to do with these deals, and if so, when?

A. Yes, sir, I started—First, of course, I just sat in on the transaction in,—well, starting with the 1936-37 season and in subsequent seasons I had more and more to do with

the Crescent Amusement Company, and when I say more to do with them, why, Mr. Sudekum would agree in principle as to the amount of the increase of the number of percentage pictures, and then he would say, Stengel, work out the details with so and so, and we would go over to my office and work them out.

Q. You say those details were passed on to you more and more as the years went by, is that right?

A. Yes, sir.

Q. And have Mr. Sudekum's duties and responsibilities also increased down there at the Crescent Amusement Company as the years went by?

A. Yes, sir, and so have his outside activities.

Q. Did you have anything to do with the five-year Paramount franchise deal?

A. I am referring to the franchise that is now in existence and under which the Crescent Amusement Company is now operating?

A. Yes, sir.

[fol. 2704] Q. What was your connection with that Paramount franchise?

A. Well, Crescent was using the 35-36 product and didn't use the 1936-37 product. However, along in the summer of 1937, or the early part of 1937, Mr. Morgan got in touch with Mr. Sudekum. Mr. Sudekum gave me the old correspondence and told me what had happened to the theater up here and why he had made the 1935-1936 deal; and from that point, on every trip that he made to New York and every conference that he had with any of the representatives here in Nashville, I was present.

Q. Now, after the deal was agreed upon in principle, did you work out the details of that Paramount transaction also?

A. Yes, sir.

Q. In such things as repeat clause, for example?

A. Well, you see, in working out a deal the principal thing is your money; and they had agreed to this fifty-seven or fifty-eight thousand dollars, and that was the Crescent Amusement Company only; and then from that point on we took the individual towns, and there were four percentage pictures that we had to arrive —, and Paramount had to arrive at the total percentage of the pictures; and they finally figured they were worth seventeen per cent.

[fol. 2705] Q. Now you say you went to New York with Mr. Sudekum in connection with that deal?

A. Yes, sir.

Q. And I believe that contract was finally dated as of November 1, 1937, but not actually executed until some time in 1938, is that correct?

A. Yes, sir, some time later. I could not be sure of that.

Q. Did you make a Paramount franchise contract with Rockwood?

A. Yes, sir.

Q. What were the circumstances of that?

A. Well, I bought from Paramount, and in view of the fact that they were giving Mr. Sudekum the theater down here, they wanted representation for their product in every possible situation. However, I told him that I didn't think we would be interested in making a five-year deal which would carry an increase each year.

Mr. Morgan said that he thought that we could get together on the increases and the terms, so we sat down and ultimately worked out a deal.

Q. Was that at the time (same time) as the one for Crescent?

A. Yes, sir.

Q. Was that deal worked out as an agreement for all the Rockwood and Crescent affiliates, when it was worked out for Rockwood?

A. Yes, sir.

[fol. 2706] —. Do you recall the negotiations for the new Warner Brothers franchise for the Crescent Amusement Company to take the place of the one which expired in the end of 1939?

A. Yes, sir.

Q. What connection did you have with that deal?

A. Well I sat in on all of the negotiations and when Mr. Kalmenson came down he wanted the formula, the national formula, that they had had at that time for Crescent Amusement Company towns, so many pictures on percentage and some pictures on percentage to a split figured with a reversing clause in our previous deal with Warner Brothers, all our pictures were on percentage, so all that was worked out and was figured as to the flat rentals on them, I did all of that.

Q. After the principles of that deal had been agreed upon, did you work out the further details with any representative of Warner Brothers?

A. After the principle was worked out with Mr. Kalmenson, he and I went up to my office and I worked out the deal for Rockwood, including all of that.

Q. I was not referring to Rockwood especially but all of them, Rockwood and the other companies of that kind, and with reference to such things as films, did you work out matters of that kind afterwards?

[fol. 2707] A. Yes, sir.

Q. With whom were they worked out?

A. They were worked out with Mr. McCoy and Mr. Williamson and the various branch managers whose territory was affected.

Q. Now then in regard to the Rockwood franchise with Warner Bros.; did you state you did also make a deal with Mr. Kalmenson with the Rockwood corporation?

A. Yes, sir.

Q. Does that include the affiliates of Rockwood?

A. Yes, sir. I negotiated all the film deals for these partners, and I told the salesmen, we worked out this deal. For example for Cherokee subject to Mr. Hendren's approval and then I will call Mr. Hendren and ask him if the deal is all right, and I think nine out of ten times he has said it is all right.

Q. You have always in negotiating for these affiliates of Rockwood, you have done that at the same time that you negotiated for Rockwood proper, is that correct?

A. Yes, sir.

Q. Now the current Fox franchise, the three year franchise which is now in existence, were you present at the meeting in Mr. Sudekum's office, which has been testified to, when Mr. Wilson was present?

[fol. 2708] A. Yes, sir.

Q. What happened at that meeting, who was present and what in general took place?

A. It started just a month or so before that in Atlanta.

Q. Tell us about that?

A. I was in Atlanta and met Mr. Rosenbaum, and I do not know how it came about that we decided we would go up and talk to Mr. Paul Wilson; as our deal was running

out and we walked on up there and I met Mr. Ballance I believe at that time for the first time.

Q. When you say the deal was running out, what do you have reference to?

A. Rockwood and Crescent and Mr. Rosenbaum told me his was running out, and suggested that while we were there that we should go up and visit Mr. Wilson, I don't know how it came about, but we went on up there and started talking about the deal, what he had in mind, Mr. Rosenbaum for Muscle Shoals, and the other theatres.

Q. You were talking of Crescent and Rockwood?

A. Yes, sir, not much serious negotiations principally conversation, which didn't last over ten or fifteen minutes and Mr. Wilson said he wanted a twenty-five percent increase, I believe, and I told him I would be glad to deliver that message to Mr. Sudekum, and Mr. Rosenbaum said he was not going to pay it, and that was about all there was to it.

[fol. 2709] Q. Do you know how the subsequent meeting in Mr. Sudekum's office happened to be called?

A. Mr. Wilson came to Nashville then that day for the express purpose of working out a deal—you want me to tell what happened?

Q. Yes, tell us what happened?

A. There was considerable argument about the twenty-five per cent increase, was the greatest increase, and where we thought we could increase, but he wanted to go up to twenty-five percent, and Mr. Sudekum said no, he was not going to pay that much, and the end of that day I think was a stymie.

Q. Did you have another meeting after that?

A. Yes, I believe the following day, Paul Wilson came back and Mr. Rosenbaum and myself and Mr. Sudekum, and he suggested an alternative, which I understand came about from some conversation that he had had on the previous night or on the way over, with Rosenbaum. He said may be we can get together and suggested that we were apart on the twenty-five percent increase, and that we make some of them twenty, some fifteen, some ten, some five, and so on.

Q. What towns?

A. All the towns that were in the previous franchise.

Q. I believe you said the Crescent Amusement Company franchise had also included your Tracy City and Rockwood towns?

[fol. 2710] A. Yes, sir, that is right.

Q. I mean the towns of Tracy City and Rockwood, a deal with the Rockwood Amusement Company?

A. Yes, sir.

Q. What took place with reference to the Crescent Amusement Company, I mean with reference to the increase in film rental on Crescent Amusement Company towns that Mr. Wilson wanted, was there any agreement made?

A. Well, after late in the afternoon or well in the day, he juggled some lists there, and we juggled some lists, and we agreed on some twenty percent so many at twenty percent, so many at ten percent, so many at fifteen percent, and so many at five percent, and from that point on Mr. Tony said, go ahead and work it out with Stengel.

Q. Did your meeting break up then?

A. Paul Wilson had to go to Memphis, and we went on upstairs and had started to work; but he said he had a previous engagement, had to go to Memphis and come back in a day or two and then we would finish.

Q. When he came back and you finished, what took place then in your dealings with Mr. Wilson, what did you do?

A. Mr. Wilson asked me, there were a number of towns that were not included in the original towns and we had to agree to the respective terms with reference to that with [fol. 2711] all these towns, and after we had done that, he asked me if we had a typewriter there which he could use.

Q. Do not go so into details as to that, Mr. Stengel, were there any agreements as to Crescent Amusement towns, that you had worked out the details of that up there in your office?

A. Yes, sir.

Q. What were they?

A. There was Greenville, Tennessee, was not in the original franchise, Princeton, Kentucky was not in the original franchise; Franklin, Kentucky was not in the orignal franchise; and Brownsville, Tennessee, was not in the original franachise. Now with respect to Brownsville and Greenville, we were using the previous season's product, and we merely agreed as to the percent of increase the first year, the franchise was actually in force. Princeton, Kentucky, that had carried a percentage that previous

year, and we worked out a flat rental deal, based on what the company had earned under percentage.

Q. When you had worked out the final details for the Crescent Amusement Company towns, did you proceed with any other towns? If so, what towns? I do not mean the names of them, but whose were they?

A. Well then I started talking about Rockwood towns, [fol. 2712] and told Mr. Wilson that I didn't think that I could stand that increase on Rockwood and Tracy City. Those were two of the original franchise towns, Rockwood had a twenty per cent increase and Tracy City was at the same, finally.

Q. You mean you agreed on no increase in Tracy City?

A. Finally and the other towns, yes, which were of the Rockwood Amusement Company, Ruffin Amusement Company, and Chickasaw Amusement Company, and Cherokee, we agreed, if a deal was in there the previous year, we agreed as to whether or not it carried an increase, and if so, how much, and in a case where we didn't have a previous deal, that then we worked it out at a flat rental deal.

Q. For all those towns, situations, that were not in the former Fox Franchises?

A. All of those I have been speaking of, yes, sir.

Q. All of them with the exception of Tracy City and Rockwood, Tennessee?

A. Yes, sir.

[fol. 2713] Q. Now then, go on and tell us what you started to say about Wilson and his typewriter.

A. He asked, after we got through—Of course, we had a number of notes written out and he wanted to get it in some sort of form that I would understand and he would understand. So, he asked if we had a typewriter, and I said yes. He said, I will type this up. And he went in the little office there and typed it up. He is not a very good typist, he had to sort of hunt and peck it out. When he brought it back in, I checked it and it appeared all right, other than the fact that I told him that he should have made one for Crescent, so that we could take it downstairs to Mr. Sudekum and ask him, to get his approval, and one for Rockwood, which was separate and apart, and I called his particular attention to the fact that he had included, I believe, some Muscle Shoals town on that. And he said, "Well, Rosenbaum and I agreed to our deal and this is

purely a memorandum from which the franchise will be made up. And that is just about all there was to it.

Q. Is that typewritten memorandum that has just been passed to you, dated June 27, 1939, one of the duplicate carbon copies of that memorandum that Mr. Wilson typed up?

A. Yes sir.

Q. Out of what file does that come?

A. It has come out of my file.

[fol. 2714] Q. Is that signed by anyone?

A. Yes sir, it is signed by Mr. P—It is actually Paul Wilson. I don't know what his initials are, I think P. S.

Mr. Waller: We offer that as Defendant's Exhibit No. 146.

The Court: That is the same thing as Government Exhibit 286?

Mr. Waller: Yes, it is another carbon copy. It bears the signature of Mr. Wilson.

The Court: All right.

Mr. Waller:

Q. What was done about your suggestion that there ought to be three separate memoranda? Was that waived or not?

A. Well, Paul said, "This doesn't mean anything, this is just a memorandum from which I am going to draw up the franchise, or rather, write the New York office to draw up a franchise." He says, "All it indicates is the meeting of the minds." And we went down to Mr. Sudekum's office and went over the particular deals that I had negotiated for the Crescent Amusement Company towns, other than the towns that carried the increase. I called Mr. Tony's attention to the fact that all the towns on there, that Paul had written this himself and that he was to sign for the Crescent Amusement Company, and I told Paul why I signed a copy for our towns.

[fol. 2715] Q. You say "our towns," what do you mean by that?

A. I mean, Rockwood, Kentucky, Ruffin, Dickson, and those various companies and I gave Paul those, and I think that I signed the original.

Q. Was there any copy of it signed by Rosenbaum?

A. Oh no sir, there wasn't any copy signed by Rosenbaum.

Mr. Waller: I just asked that to save Mr. Mitchell the trouble.

Q. What was your understanding with reference to whether or not, under the Fox franchise, you included the Rockwood towns in the same way that the former franchise had included them?

Mr. Wright: There, again, that calls for a conclusion. He can tell what was said and done there.

The Court: Yes, just tell what was said.

A. I don't understand your question.

Mr. Waller:

Q. Was there anything said at that time about having the franchise agreement that would include the Rockwood towns, Cherokee towns, etc., along with the Crescent Amusement Company towns, as in the former Fox Franchise?

A. Oh, no sir, no sir.

Q. Nothing was said about that one way or the other?

A. There is one thing that I would like to clarify with regard to the original Fox franchise and the two towns of [fol. 2716] Tracy City and Rockwood. Mrs. Brockett did the booking for those two towns, she has the booking for the Crescent and she did the booking for those two towns, and as far as outside people knew and the Film people knew, they all thought they were Crescent Amusement Company towns and we never did tell them there was any difference until I started to working in other towns.

Q. Had any change taken place in the way Rockwood Amusement Company or Rockwood Amusements, Inc., functioned after additional towns had been acquired and after it had obtained interests in other corporations?

A. Yes sir. In the early part, or some time in 1936, I don't recall what time, but a little boy by the name of Aby Rochberg, he had been errand boy around Crescent Amusement Company for years and he came over to Rockwood Amusements and he started booking, and of course, other work too, but he started booking for Rockwood and Tracy City, I believe we had Manchester and Huntingdon along about that time, I don't remember the dates.

Q. From that time on did Rockwood and its affiliates have a separate booking department?

A. Yes.

Q. From Crescent?

A. Yes sir, and a separate bookkeeping department, from the beginning.

[fol. 2717] Q. Then, what about general offices, did you have different offices from the Crescent Amusement Company?

A. Rockwood offices were, to start with, were about as big as this space where the Judge is sitting here, and that is all and Aby and I were in it, that is all there was to it. They were in the Crescent building.

Q. Did you pay rent to the Crescent Amusement Company?

A. No sir, I did not because I was working for the Crescent Amusement Company, we didn't then, we didn't in the first year or two.

Q. What was the development and arrangement as you acquired interests in other corporations and acquired additional towns?

A. As it acquired additional towns and acquired interest in additional corporations, we employed more people and I finally got a secretary. I used to write my own letters, or a stenographer, rather, then we got another girl, and finally we took up most of the space over there and then we started to pay rent.

Q. When was it Crescent Amusement Company moved to the present office building on Fifth avenue, the present building occupied by the Company on Fifth Avenue?

A. I think about two years ago, this past December.

Q. Has Rockwood space in that building also?

A. Yes, it has the entire second floor.

Q. Your office is on the second floor?

[fol. 2718] A. Yes sir.

Q. Do you rent that space from the Crescent Amusement Company?

A. Yes sir.

Q. And you have separate stenographers, separate equipment, etc.?

A. Yes sir.

Q. Was that the situation when the new Fox franchise was negotiated?

A. Yes sir.

Q. Now, I believe there was some testimony that you received through the mail from Mr. Wilson a document which included Crescent towns and your Rockwood towns and affiliated towns, in the same document. Did you regard that as a mistake or not?

A. Yes, I did.

Q. Did you return the document to be re-drafted?

A. Yes sir.

Q. In your letter I think something was said about present conditions; did you have reference to this lawsuit that is now on trial?

A. Yes sir, I did. I would like to amplify that answer, if I may?

Q. All right.

A. By telling you that Mr. Wilson called me, as I recall, after he got the letter, he called me or wrote me, and asked if we would not accept the franchise inasmuch as it necessitated a great deal of work to prepare another [fol. 2719] copy. I told him that it would have to be that other way, and again explained this lawsuit to him.

Q. Well, had it been your understanding prior to the lawsuit and prior to the receipt of this franchise, that it was to be in one document or two documents?

A. No, it was to be in two.

Mr. Wright: That is objected to as being nothing but a conclusion. Let him tell what happened.

The Court: Did you have any conversation about that and tell Mr. Wilson at the time that there were two, inasmuch as they were booked through separate offices, did you tell him to prepare two separate franchises?

A. I would think that I did, but I could not make a positive statement to that effect.

Mr. Waller: I think it is competent to ask the witness to explain because this letter has been introduced from which the Government, I suppose, intends to argue that he only wanted two franchises because of the lawsuit.

The Court: I think that would have been a very good reason to want them separated.

[fol. 2720] Mr. Waller: I think so, too, but I want to show he expected to have two anyway.

The Court: That is what I am trying to find out.

Mr. Wright: I think he may show it, the question is, how he shall show it. We asked him if there was any conversa-

tion about how the franchise should be made up at the time the memorandum was made, and he said no, there was not.

Mr. Waller: You can have an understanding without words, sometimes. I think he is entitled to tell what his understanding was.

The Court: All right, let him tell what it was, and then tell how he got it.

Mr. Wright: I don't think either he or Mr. Wilson is psychic, I think they are dependent upon words for communication, just like the rest of us, if there is going to be any understanding about what it about to happen.

Mr. Waller: Perhaps there was a difference in the situation in the Rockwood corporation at the time the first franchise was made and what the situation was when the second was made.

[fol. 2721] Q. I am asking you what your understanding was before you got this document and the letter, as to whether you were to get one or two franchises?

A. Well, I called, if you recall, I told you that in this memorandum, I called Mr. Wilson's attention to the fact that at that time, that he had everything grouped in under one head. And he said, well, that is just a memorandum affair which I will submit to New York and then it will be drawn properly. That is as far as I can tell you with regard to whether—I don't think there was anything specifically said with regard to two or three or how many franchises.

The Court: That was not discussed, other than what you told him about that?

A. That is right, other than what I told him, that it was all right to throw these Rockwood companies in. And I said, as far as Ruffin Amusements and Elizabethton and those other situations, they were all right to be included on that one memorandum. I was merely speaking of the Crescent, because I knew Mr. Sudekum was going to sign it.

The Court: You did know when the franchise was prepared, that the Crescent and Rockwood towns were retained in one franchise, and Muscle Shoals in another?

A. Well, Muscle Shoals never did have anything to do with our negotiations at all.

[fol. 2722] The Court: I know, but they were in these memoranda you are talking about?

A. Rosenbaum had gone home and Wilson went to Memphis, and we hadn't completed the negotiations for the terms for the individual towns. When he came back, we had these various memoranda and Paul Wilson said that he wanted to draw it up, and he talked about the typewriter, then he drew one up. After he brought it in, I called his attention to the fact about Muscle Shoals being on there and Rockwood towns being on one. "Well," he said, "It won't made any difference, I am just going to take it and use it to draw up the franchise. I don't know whether he used the singular or the plural there. Then I went to Mr. Sudekum's office and Mr. Sudekum pointed out—I remember this very well, he said, "Well, I can't sign for Muscle Shoals, Stengel". "Well," I said, "all I want you to do, you sign for Crescent Amusement Company and that is for Crescent Amusement Company". We didn't think it was a permanent record at that time. It merely showed the understanding as to the terms.

[fol. 2723] By Mr. Waller:

Q. Now, Mr. Stengel, his Honor asked you how you accounted for the fact that whoever drew up this Fox franchise included the Rockwood towns with the Crescent towns.

The Court: No, I didn't ask him that.

Mr. Waller: I misundertsood the question.

The Court: I asked him how he accounted for the fact that after all this conversation that he talks about, how he accounts for the fact that when the franchise was finally prepared that the Rockwood and Crescent franchises were in one franchise and the Muscle Shoals in another.

A. Well, our franchise was signed, the final franchise was signed long after Muscle Shoals and our franchise has come clauses in it that I don't believe Muschle Shoals franchise has in it.

By the Court:

Q. What I mean is, why when the franchises were prepared, in view of those circumstances would the Rockwood and Crescent franchises be contained in one instrument and Muscle Shoals in another?

A. Mr. Rosenbaum has always made his own deals. I mean when I say "own deals", there has never been any joint negotiations.

By Mr. Waller:

Q. Well, Mr. Stengel, had the former Fox franchise in-
[fol. 2724] cluded the Rockwood towns and also the Crescent towns?

A. Yes sir, as I told you, there was Tracy City and Rockwood which we didn't tell—at the time I had, that is when we first acquired these towns we didn't tell them that they were not operated by Crescent Amusement Company nor did we tell them that they were operated by Rockwood and, by inference I expect that they thought they were Crescent towns.

Q. In any event the franchises were then separated, I mean your current franchises were separated in one franchise for Crescent and the other for Rockwood and affiliates?

A. Yes sir.

Q. Now, had the deal sheets for the two corporations or sets of corporations, I will say—I mean Crescent on the one hand and Rockwood on the other hand—been signed before this formal franchise was received?

A. Yes sir, within a relatively short period of time after Mr. Wilson went back to Atlanta and after I received, I think, a wire from Mr. Ballance that the deal had been approved, as per the memorandum, then Mr. Wilson made up individual deal sheets. It is a paper about the size of a letterhead and there was one made for each town, and it shows the names of the theatres in the towns and the terms, and down at the bottom it stated our clearance would be agreed upon, I think. And those were signed by Mr. Sudekum for Crescent and me for Rockwood. Now, Mr. Rosenbaum's sheets must have gone to him or I don't even know that he signed them.

[fol. 2725] Q. Did Mr. Sudekum sign any Rockwood or did you sign any Crescent sheets?

A. No.

Q. And that was before this franchise was ever received that had been made up so as to include both corporations in one instrument?

A. Yes sir, that was before the franchise.

Q. Has there been an occasion since you have been connected with Crescent and Rockwood, in addition to this first Fox franchise, where deals were made with any distributor

and the deals for different corporations included in one formal contract or agreement?

A. You mean Rockwood towns and Crescent towns?

Q. Yes.

A. Yes, our deal with United Artists Corporation calls for so many runs that is all in one instrument.

Q. That is Rockwood towns and Crescent towns?

A. Yes sir.

Q. All under the same cover?

A. Yes, sir, but I am not positive without seeing it—I think that it indicates that the towns are operated by different companies.

Q. Now, in the United Artists deal was Cumberland Amusements or Strand Enterprises or Muscle Shoals included?

A. No.

Q. What is the average size of those Rockwood towns, and I mean by Rockwood to include Cherokee?

[fol. 2726] The Court: Well, you have got all that in the record, haven't you?

Mr. Waller: I don't know whether the average is in there or not. I have the tabulations here.

Q. Did you work out or have a memorandum as to the total populations and the average?

A. Yes sir.

The Court: I thought Mr. Wright had a list of all those towns with the populations.

Mr. Wright: We object. In the one he is offering now he says he has the total populations and then struck an average: We didn't have an average on the list I submitted. All we did show was the towns with the 1930 population and the 1940 population as per the census.

Mr. Waller: I don't recall that exhibit. Does it separate the towns of the different corporations?

Mr. Wright: I think it does, yes.

By Mr. Waller:

Q. Well, anyway, do you have it in front of you, Mr. Stengel?

A. The average population of the thirty three Rockwood, of the Rockwood, Cherokee and Kentucky towns is

[fol. 2727] twenty three hundred. I don't know what the combined population is because we don't have that figure. I can give you the figure for each one of the corporations.

Mr. Waller: Well, subject to approval of counsel of the Government, I have that here and I would like to read it into the record, subject to correction. Is that all right, Mr. Wright?

Mr. Wright: Except that I don't see that it has anything to do with the lawsuit. That is the only objection.

The Court: How does it affect the lawsuit if you have thirty three towns with a population of a hundred thousand and you divide a hundred thousand by thirty three and get the average?

Mr. Waller: I want to show, your Honor, that the Rockwood circuit and the Crescent circuit are two entirely different types of operation; that the operating theatres in small towns like these is a different proposition from the other.

The Court: I think that is already in the record that the Rockwood towns and the other towns are smaller towns than the Crescent towns.

[fol. 2728] Mr. Waller: That is in the record but I don't think the figures show. I would like for your Honor to know what they are. It would take but a minute to read them.

The Court: All right. If you want to put in the population of each town, I think that is all right but I don't see how it would help you.

Mr. Wright: It is already in the re-.

Mr. Wright: You have thirty three towns with an ayerage population of three thousand each.

Mr. Waller: I wont put it in if your Honor doesn't think it is pertinent.

The Court: It is all right. Go ahead.

Mr. Waller: Merely this, that there are thirty three towns with an aggregate population of 76,415, an average population of 2315. In other words, the total population of all these Rockwood towns, including the affiliates, is less than half the size of Nashville.

[fol. 2729] Q. Now, Mr. Stengel, has there been any opposition or competition in any of these Rockwood towns, and if so, state what that opposition or competition has been?

A. Well, we had opposition for a few weeks in Central City when we first went in there.

Q. Was that Mr. Pittman?

A. Yes sir. He was already operating one theatre and we acquired the other theatre.

Q. You acquired that Central City theatre, the Selba, from the owners of the Selba, did you not?

A. Yes sir.

Q. And the Empress Theatre was already operating at that time?

A. Yes sir.

Q. And then shortly after sold out, is that correct?

A. Well, he wrote us a letter, asking us if we would buy it.

Q. And you did buy it out?

A. Yes sir. There is another one, Rogersville, still.

Q. In Rogersville what was the situation?

A. The Rockwood Amusement Company bought the Rogersville Theatre from the Cumberland Amusement Company.

Q. Well, at the time you bought that theatre was there a competing theatre?

A. Mr. Miller was operating the Palace Theatre.

Q. And with those two exceptions, a few weeks in Central City, Kentucky, where you bought the theatre with the opposition already in existence, and the Rogersville situ- [fol. 2730] ation where you bought the theatre with the competition already in existence, have you had any competition in any of these Rockwood or Cherokee towns or *towns or* any affiliate corporations, which are defendants in this case?

A. Not any theatre competition, no.

Q. Now, with reference to Newport, Tennessee, is there any competition?

A. Yes, Tim Smith built a theatre over there and closed it up.

Q. Are those the only situations where there was any competition or opposition?

A. Now, you are speaking of defendant companies?

Q. I am speaking of defendant companies, yes sir.

A. That is all.

Q. I will also include Newport, which is not a defendant company. I didn't ask about Ruffin. Was there any such instance in the Ruffin towns?

A. To my knowledge there was not. However, there was some talk about a theatre going to be started in Hickman and I think some work was started on a building over there. That is the only other situation I know of.

Q. Now, Mr. Stengel, have you made up an exhibit from the books of Rockwood, showing the investment of Rockwood and each of the affiliated corporations in these theatres —I mean the Rockwood towns and Cherokee towns?

A. Yes sir, we have made up a schedule showing the original cost of the theatre, the date of the new equipment [fol. 2731] that was bought, and the date the remodelling took place.

Q. Now, do you have one of those for Rockwood Amusements, Inc.?

A. Yes sir.

Q. And one for Cherokee Amusements, Inc.?

A. Yes sir.

Mr. Waller: We will ask that the tabulation for Rockwood Amusements be marked Defendant's Exhibit No. 147; and the Cherokee tabulation be marked Defendant's Exhibit No. 148.

We offer those in evidence, your Honor.

By Mr. Wright: If the Court please, I think these are wholly immaterial. We, of course, haven't any idea what these figures show, and in any event, I don't see what significance they have. I don't see why they should be put in.

The Court: Well, it might show the size of the companies and the financial——

Mr. Wright: We have already shown that. We have got figures which show what the total assets of the companies are, and how much business they do. I don't see what the purpose of these additional figures is in showing the equipment cost, original land cost and remodelling cost. I just don't see what they are supposed to prove or disprove.

[fol. 2732] Mr. Waller: The Government evidently thought they were material because they filed interrogatories and made us get up the information and we thought now that we had gotten it up, we would file it.

Mr. Wright: Is that the same information that was included in the answers to the interrogatories?

Mr. Waller: It may be in a little more detail but I think the same information is in there. We gave the original cost, the remodelling cost and equipment cost, new equipment.

Mr. Raftery: May it please the Court, the distributors would like to have this evidence for the reason that we want to show that they are regularly constituted theatres in these towns and we want to show that we have a desire to sell regularly constituted theatres, and it is absolutely pertinent from the distributors standpoint.

Mr. Wright: What this has to do with regularly constituted theatres I don't know. If they spend $15,000 for land it is a regularly constituted theatre, and if they spend $14,000, it is not? I just don't see the significance of this from Mr. Raftery's standpoint.

[fol. 2733] Mr. Raftery: The answer to it is simply this: Radio City owns the Music Hall and it is the show place of America, the biggest theatre in America, the finest theatre. It naturally gets the best attractions and by the same token, if these figures, and I have never seen them, have any connection to show that there is a substantial investment in a theatre in a town, it is a theatre which the distributor has a desire to sell, irrespective of the ownership, and that is the proposition we think is pertinent from the distributors' angle.

Mr. Wright: Possibly I should have read that American Magazine article.

The Court: Well, if I recall, that doesn't hold that but Radio City Theatre didn't do any good until it changed managements.

Mr. Raftery: That is right.

Mr. Waller: We have got both elements here.

Mr. Raftery: That is only half of it.

The Court: Let me see that.

[fol. 2734] (Tabulation passed up to the Court.)

The Court: I overrule the objection.

By Mr. Waller:

Q. Have you also made a similar tabulation giving the exact figures on the Crescent Amusement Company towns, Mr. Stengel?

A. Yes sir.

Q. About which Mr. Holman and Mr. Sudekum were asked and couldn't give those exact figures and dates?

[fol. 2735] A. Yes, sir.

Mr. Waller: We offer that as Defendant's Exhibit 149.
Mr. Wright: Same objection.
The Court: Overruled.

Mr. Waller:

Q. Now, Mr. Stengel, I notice that on the tabulation as to Rockwood, you have only an expenditure of $662.83 on the Theater in Providence, Kentucky. Will you explain why that theater and the expenditures on same are out of line with most of the others?

Mr. Wright: What possible difference can it make why the expenditures in Providence were $600.00 or what the expenditures are in any event.

The Court: Well, let's see what he says about it.

Mr. Waller: We thought Mr. Wright might think the Providence Theater wasn't so hot.

The Court: Go ahead.

[fol. 2736] A. The theater we acquired there is a theater with a very narrow building, about 22 by 25 feet; and we have wanted to remodel the theater ever since we have been in there; however, under the Kentucky law any theater with a seating capacity of over 300 seats has to be fireproof; and we wanted to put in a balcony, and you can't get many seats in a balcony only 25 feet wide; and so we had been looking around to see if we couldn't find another theater up there, put in another theater up there; in a town of 2700 population, to put in a theater would have cost about $35,000.00, and we weren't doing any good up there, weren't taking in up there over $140.00 to $150.00 a week, and we didn't think it would help us——

Mr. Wright: Well, we don't think anybody, Crescent or anybody else, would put in a new theater, unless there was a chance to make some money out of it.

The Court: Well, as I recall, you are insisting they are not putting in as good theaters in the towns, except where they have competition.

Mr. Wright: No, we don't contend that; of course, if the investment looks as though they can make some money, they [fol. 2737] will make the investment, sometimes competition is an additional stimulant; sometimes, without competition, if it looked as though you could get more out of your town by improving your house, I suppose you would im-

prove it. I don't see any dispute there at all. That is in the normal course of business.

The Court: I suppose so. I overrule the objection.

Mr. Waller:

Q. Now, what about Oneida, Tennessee; what is the situation there?

A. We have been trying to remodel Oneida, Tennessee, for the last year or two; we have a man who has done a lot of work for us by the name of Spate, and for one reason he has been busy, and the other reason is that we couldn't get together with our landlord; and it so happened that that was this past week, and we have started remodeling this theater right now—within next week.

Q. Was that on account of this lawsuit?

A. No, sir; we think we can make money up there if we can get a nice theater up there.

Q. Now, that theater in Central City, Kentucky, have you spent more money on the interior or the exterior of that building?

[fol. 2738] A. Well, that theater is large enough to put a circus into it, and it has a "Lone Peacock Alley"; it is but 20 feet wide and runs back about 80 or 90 feet with some steps in it; there isn't much you can do to it; we painted the lobby in there and decorated the ceiling and walls, and in the auditorium we put in new seats, and a new cooling system was put in; we spent about twelve or fourteen thousand dollars, I believe.

[fol. 2739] Q. I think this shows $12,419.00, that is mainly on the plant?

A. Yes, sir.

Q. Now, Mr. Stengel, in these towns where Rockwood and affiliates operate theatres in small towns, what is the situation with reference to newspaper advertising for your theatres?

A. Well with all due respect to the small town newspaper it is not a very good medium of advertising.

Q. Do they have daily newspapers in those towns?

A. No, sir, they are weekly newspapers.

Q. What do you do with reference to the exploitation of your pictures in those small towns?

A. We have been in these small towns, under twenty-five hundred, it is mighty hard to make expenses, unless you have some special means of advertising in that particular

area, so there are some of our managers who have what was called a gas route, and that these boys distribute hand bills, and this gas route, that is a route of around from a hundred to a hundred and fifty miles, we have little hand bills, circulars made that in addition to the handbills distributed, we have the cars and he gets in the car and rides until he comes to a cross-roads, and these boys get out and deliver the advertising, and he drives up — the cross-roads store, and goes in and buys a Coca-Cola and he talks his [fol. 2740] business, and we get the benefit of that as well as the boys delivering the bill, and they are reminders at the door-step of every house. We do run ads in the newspapers, not display ads, small ads.

Q. Let me ask you this: are there any substantial numbers of those towns, situations where there had been no theatre before Rockwood or the affiliated corporation opened up t- theatre?

A. Oh yes, a number of them.

The Court: All right, adjourn court until Monday at 9:30.

Court thereupon adjourned.

[fol. 2741] Monday Morning, August 26, 1941.

Volume XXVIII

K. C. Stengel, Direct Examination Resumed:

Mr. Waller: Your Honor, on Friday, we offered an exhibit, which was Defendant's Exhibit No. 149. We would like to withdraw that exhibit and will clarify the figures. The Exhibit offered on Friday contains some bookkeeping figures that had depreciation figured in them, in some cases, and in other cases, not. We would like to withdraw that exhibit and offer one which only shows the exact amount spent during the years ending June 30, 1935, and subsequent years, without any depreciation figured on any of the items and without undertaking to include investment as per books to the original date shown in the Exhibit.

The Court: What does that cover now?

Mr. Waller: This covers a period from June 30, 1934, down to date, showing all expenditures for additions, rebuilding, remodeling and improvements on theatres.

The Court: All right.

[fol. 2742] Mr. Waller:

Q. Do you have that, Mr. Stengel?

A. Yes sir.

The Court: How is that material to the questions in this case?

Mr. Waller: Because, the Government has introduced evidence as to monopolistic profits which, as I understand the Government, was supposed to be based on inequitable film rental. We desire to show that one reason for the success of these theatres is the fact that they have kept them up to date and in good condition and that people prefer to go to theatres of that kind. Also, the film companies preferred to deal with concerns that have theatres of that kind, for the reason that it helps their product in various ways.

The Court: If they had the finest theatres in the world, that would not excuse a violation of the Sherman Act.

Mr. Waller: No, your honor, but it is involved in whether or not the Sherman Act has been violated. In other words, we don't argue, by any of this evidence, that it would excuse a violation of the Sherman Act; we say, in determining whether the Sherman Act has been violated, that your [fol. 2743] Honor would have to consider these facts, along with the others introduced by the Government. We think the Government has introduced a great deal of evidence which is incompetent and immaterial, in this case and it is necessary for us to rebut that evidence by showing other facts and circumstances because the Government has only shown a partial picture.

The Court: All right, go ahead.

Mr. Waller:

Q. Mr. Stengel, on Friday, when we adjourned, you had testified that these so-called Rockwood towns, including the towns in the Rockwood Corporation, proper, and its affiliates also, were relatively small towns and that they were one-theatre towns. I want to ask you in that connection whether or not the business of operating theatres in small towns of this character is a hazardous business?

A. It is more hazardous than operating theatres in larger towns.

Q. Will you explain that answer?

A. Well, I don't think that hazardous is quite the adjective that explains the nature of the business. The small

town theatres are hard to operate inasmuch as you have to dig for business. The corporate limits, or rather, the [fol. 2744] people within the corporate limits, are not enough in numbers to maintain the theatre. Therefore, it is necessary to go out in the trade area to get these people to come to our theatre or the small town theatre rather than to go elsewhere. It is developing a habit in those people. If we don't develop that habit, why they would play bridge or do other things other than to come to the theatre.

Q. During the five-year period covered by this suit and the succeeding period up to the time of the trial, have there been any abnormal advantages in the operation of these theatres as the result of the Governmental policies during this period?

A. Yes, very much so. The theatre business is largely dependent on the patronage of people who are wage earners. The Government, during the last six or eight years, has established WPA projects, unemployment insurance and all of those things, which has given money to the show-going people or masses, that is, the people that we cater to.

Q. Have you or not, in those small towns, undertaken to develop the negro business?

A. Very much, yes sir.

Mr. Wright: I didn't hear it, what was that?

Mr. Waller: Negro business.

[fol. 2745] Mr. Waller:

Q. Has that been an important item?

A. Yes sir, it has been something that, when we have developed it, the net results has been more or less a margin of profit.

Q. Now, you have stated that in these small towns, you have no motion picture competition, with certain exceptions that have been mentioned. Is there any other sort of competition that you meet in the operation of motion picture theatres?

A. Yes sir.

Q. What, for example?

A. Well, one of the severest forms of competition that we run into are these affairs such as soft ball games, miniature golf courses, revivals. And I might say, with respect to revivals that the smaller the town, the more competition

they represent. The reason for that being that in very small towns, everybody is interested in anything new that comes to town and evangelists that go into small towns are usually of the sensational type and after they have opened their stay in the town depends on how much interest they can work up in the community.

The Court: And how much the collection is?

A. I wasn't going to say that. And sometimes, they stay there for six or seven weeks. And we have had cases where they have asked to use one of our buildings, and maybe we were not in position to give them the building because it was rented to somebody else; and, in that event, they would probably spend three weeks of the six weeks telling about [fol. 2746] the sins of the theatre. In other cases where we did give them a small theatre that we had closed, they have emphasized that they didn't particularly like the idea of Sunday shows, when we were about to get some Sunday shows, and that closed that issue for a time.

Q. Now, Mr. Stengel, there has been something said about screen advertising and how the popcorn sales has entered into the profits shown in the income tax figures, filed by the Government in this case. Have you, for your Rockwood Company, had a statement prepared giving the relative importance of screen advertising and popcorn sales as compared with other sources of revenue?

A. Yes sir.

[fol. 2747] Q. Will you state what those figures are and explain them for your corporation as a whole?

A. Well, letting the net profit of Rockwood Amusements, Inc., as it appeared on the 1940 income equal 100 per cent——

Mr. Wright: I don't understand but I might point out that the 1940 figures are not in evidence. All we offered were the five years ending with the year 1939.

Mr. Waller:

Q. Well, regardless of that, did you make a statement for 1940?

A. Yes sir, I have it for 1940; but it runs fairly constant.

Q. Well, as long as you have it for 1940, will you give those figures and explain them for that year?

A. This net profit equals 100 per cent. The net profit from popcorn sales and screen advertising equals 39 per cent of that figure. The net profit from theatre operations equals 36 per cent and the dividends from other corporations equals 25 per cent. Those three figures make the total of 100 per cent.

Q. If you eliminate the dividends from other corporations and simply take the profit or income from Rockwood Amusements, Inc. proper, what is the per cent of net profit attributable to popcorn sales and screen advertising as compared with other revenue?

A. It is 52.5 per cent of the total.

Q. In these towns, Mr. Stengel, have you tried to get the best popcorn which is available, choicest popcorn?

[fol. 2748] A. Yes sir. We have found that popcorn is like merchandizing any other article. First, you have to have clean machines; you have to have an attendant that looks clean—his hands are clean and he wears a little jacket and then we go out and buy the best popcorn that we can and we have to have a place here to store it. If you know anything about popcorn, it depends on the moisture content, the percentage of moisture content as to whether it is good corn or not. I mean that is one of the important factors. The same is true with regard to seasoning.

Q. Now, in these small towns where you sell this popcorn has your overhead expense or any other expense over and above what you would ordinarily have in operating those theatres increased or what additional expenses does your corporation have in selling popcorn over and above what it would have if it didn't sell popcorn?

A. Well, of course, the space is available for us. We have to buy popcorn machines and use a little electricity and we employ a boy or girl to sell the popcorn, but as far as overhead is concerned, it costs very little. We pay the local manager a percentage of the popcorn receipts and he looks after it.

Q. Have you figured, in arriving at those percentages, the salary of your popcorn boy or popcorn girl and depreciation on the popcorn machines as items of expense?

A. Yes. And in addition, cost of all supplies.

Q. And the cost of all supplies.

A. We haven't allowed any figure for rental and we [fol. 2749] couldn't determine how much electricity was required in running the machines.

Q. So, in arriving at these percentages, you haven't deducted the cost of electrical current or any hypothetical rental of the space in your lobby?

A. That is correct.

Q. What about the screen advertising? Is there additional expense to screen advertising over and above what you would have anyway?

A. No sir, none at all. Our screen advertising runs two minutes, maximum, on every complete show and the film is sent to us prepaid and the operator puts it on and runs it with the other film. As far as expense to the company is concerned, it has not been increased at all.

Q. About how long ago did you develop the popcorn business in connection with your theatres and the screen advertising? Just give a brief statement or history of those items in your corporate income.

A. Well, in the early 30s the general procedure with respect to screen advertising was that the local manager might want some beaverboard or other supplies around town and he would go to the merchant and say "I will run a slide on my screen if you will give me this." As a result, the income to the company was negligible. About 1936 or 1937 we decided that screen advertising was a good medium of advertising inasmuch as it represented two things, vision and sound, as it combined the newspaper and the radio, so we [fol. 2750] talked with one of the national companies with regard to screen advertising and attempted to set up rates in our various towns and as a result we get a very substantial income from screen advertising, and that advertising is conducted in such a way that it will not affect the public by staying on the screen for too long a period of time.

Q. Now, what about the popcorn? When did you start that business?

A. Well, we went into it intensely about three or four years ago.

Q. At the same time that the Rockwood corporation went into these extra sources of revenue and profit did the Crescent Amusement Company do the same thing?

A. Yes sir.

Q. In addition to your over-all figures for Rockwood which you have given, have you, at my request, segregated a few of your specific Rockwood and Cherokee towns with reference to popcorn sales to show a comparison as to both popcorn and screen advertising with other sources of revenue in those towns?

A. Yes.

Q. What towns did you make those figures for?

A. Greeneville, Kentucky, Providence, Kentucky, Manchester, Tennessee, Cowan, Tennessee, Burnsville, North Carolina and Oneida, Tennessee.

Q. Now, in any of those towns did your margin of profit [fol. 2751] depend entirely upon the screen advertising and popcorn sales?

A. In four of the six towns listed we showed a loss before figuring income from popcorn and screen advertising.

Q. Which four of those towns are they and what were the figures with reference to popcorn sales and screen advertising as compared with the net loss from other operations?

A. The Palace Theatre at Greeneville, Kentucky showed a loss of $1172.55 from the theatre operations. After figuring the profit from popcorn sales and screen advertising that figure changed to a net profit of $491.78. In the Lido Theatre at Providence, Kentucky before figuring the income from popcorn sales and screen advertising it showed a loss of $283.86 and after taking those increments of income into consideration our profit was $637.75. The Rex Theatre at Cowan, Tennessee showed a loss from theatre operations of $64.33 and after taking into consideration the popcorn sales and advertising our net profit was $962.85. [fol. 2752] (Continuing) A. In Burnsville, North Carolina, the Yancey Theatre, we showed a loss of $148.47. After taking into consideration popcorn sales and screen advertising, we showed a profit of $935.47.

Q. Now, in the other two towns how did the profit from popcorn sales and screen advertising compare with the profit or loss from other operations?

A. At the Lyric Theatre, Manchester, Tennessee, we showed a profit of $245.77 from theater operations, and after allowing for popcorn income and screen advertising, our profit increased to $742.05. At the Capitol Theater,

Oneida, Tennessee, we showed a profit from theater operation of $271.54. After taking into consideration the income from popcorn sales and screen advertising, our profit was $1220.32.

Q. Now, have you had a tabulation prepared giving the itemized figures on the net profit from popcorn sales and screen advertising, the total profit and then the net profit or less from theater operations and the total net loss or profit from all sources in these situations?

A. Yes, sir.

Q. We offer that as Defendants Exhibit No. 151.

A. I would like to call your attention, Mr. Waller, also to the fact that your statement that you made a few minutes [fol. 2753] ago is true also with respect to these six situations, in that that we were unable to allocate the electric current.

Q. When you realized this profit——

Mr. Wright: May it please the Court, we would like to ask what the exhibitors intend to prove?

The Court: Well, it goes to show the net profits as shown in the income tax, which of course consists partly of sales of popcorn and screen advertising.

Mr. Waller: In other words, it is intended to show that these income figures do not show monopolistic profits, and are not offered for the purpose the Government insists they are offered, and reflects considerably on that evidence.

Q. Let me ask you this, Mr. Stengel: Where you refer to net profit and loss from theater operations, does that include any profits from other operations, stores, etc.?

A. Yes, it does; we have a number of other situations in stores and situations from which we get income and it was impossible to segregate those figures separately, because we would have to take into consideration taxes, insurance, depreciation on the building, and all like that.

[fol. 2754] Q. With reference to the Crescent Amusement Company itself, the net profits also include income from theaters and stores?

A. Yes, sir. Then they are more than the Cherokee.

Q. Does that also include the Hippodrome in Nashville?

A. Yes, sir; that is where they have boxing matches.

Q. Now, with reference to your small town theater operations, what is your relative importance of your Saturday business as compared with the business for other days in the

week? I am asking for a general statement, and then I will ask you to give detailed figures on that.

A. Generally speaking, the 33 or more situations in the Rockwood towns are concerned, that revenue runs from 25 to 50 per cent of the entire week's receipts, and averages about 33 to 35%.

Mr. Wright: What does this refer to?

Mr. Waller: Westerns on Saturday.

The Court: Westerns on Saturday?

Mr. Wright: I think we are entitled to something better than Mr. Stengel's general statement on that.

[fol. 2755] The Court: He is going to get to the other.

Mr. Waller: I am going to get to that.

Q. Now, Mr. Stengel, what is the difference in the Saturday business and the business on other days of the week, with reference to what you would show, what entertainment you provide for the public?

A. Well, we run Western pictures; we have tried other types of pictures, including pictures which border on the Western, such as Zane Gray pictures; and we find that there is not enough shooting and action in those pictures to interest the country trade that we cater to, and they just won't come to the theater.

The Court: I thought the Zane Gray pictures were particularly action pictures?

A. They are action but not quite enough.

Mr. Waller:

Q. Who produces those Western pictures?

A. They are produced by a number of independent producers and are distributed through such companies as Republic Pictures Corporation, Monogram, Big Featurites, Picture Producer Corporation. Mr. Bob Severas' enter-[fol. 2756] prises— I have forgotten the name of them; he is located in New York; and Affiliated, are a few of them.

Q. Are any of those Affiliated you mentioned in this case distribute any of the features called Western features?

A. Yes, sir; do you want me to cover that?

Q. Yes.

A. Warner Brothers, ordinarily, doesn't distribute any out of this list; Paramount had six last year; Fox doesn't distribute any; Metro doesn't distribute any; Universal

about eight; RKO has from 4 to 6, and charges a price; they are also classed as Westerns but only don't get as much business as the other type of Westerns that I am talking about.

Q. Would United Artists produce any Westerns?

A. The United Artists doesn't produce any. They produced one—the "Stage Coach,"—but it was too rich for our people's blood.

Q. In your motion picture theaters, can you state whether this predeliction for Westerns is a nation-wide matter, or is it a sectional proposition?

A. It is a sectional proposition.

[fol. 2757] Q. I understand that they are just for western pictures?

A. That generally the western pictures in the east or middle west, in the last Gene Autry that was shown in Los Angeles in an A theatre for the first time this last year.

Q. Mr. Stengel, you said you had prepared some figures comparing your Saturday business with your average daily business on days of the week excluding Saturday; is that a correct statement of the way your tabulations were prepared?

A. Yes, sir.

Q. Do you have one of those tabulations for Cherokee and Rockwood?

A. Yes, sir.

Q. Covering all the towns?

A. Cherokee Amusements towns of Oneida, Tennessee, Spruce Pine, North Carolina, Lenoir City, Tennessee.

Q. On those three situations will you now state the number of days in the week your theatres operate and the percentage of business done on Saturday as compared with the average daily business on other days.

A. Capitol theatre, Oneida, Tennessee, operates seven days. 39 per cent of our business is done on Saturday and an average of 10.2 per cent is done on each of the other six days. You want me to continue on?

Q. Yes, continue on with the other two situations.

[fol. 2758] A. The Lyric theatre at Spruce Pine, North Carolina, is a six day operation, 44 per cent of our business is done on Saturday, and an average of 11.2 per cent is done on the other five days of the week. The Grand theatre Lenoir City, Tennessee, is a six day operation. Thirty-five

per cent of our business is done on Saturday, and an average of thirteen per cent is done on the other five days.

Q. In what section of the state are Oneida, Tennessee, and Lenoir City, Tennessee?

A. They are in east Tennessee.

Q. And Spruce Pine, North Carolina?

A. Is in what part of the state?

Q. Spruce Pine, North Carolina is in what part or section of North Carolina?

A. It would be in the western part of North Carolina.

Q. Have you also prepared such percentage for Rockwood Amusements, Inc., giving the town in West Tennessee, and two in Kentucky, as well as a town in East Tennessee?

A. Yes, sir.

Q. Will you give those percentages?

A. The Rockwood theatres are as follows: McKenzie, McKenzie, Tennessee, is a seven day operation, forty per cent of our business is done on Saturday and an average of ten per cent on the other six days of the week. The Lido theatre, [fol. 2759] Providence, Kentucky, is a seven day operation, twenty-nine per cent of our business is done on Saturday, and an average of 11.8 per cent on the other days. Palace theatre at Greenville, Kentucky, seven day operation, thirty-per cent on Saturday, 11.70 per cent on the other six days. The Rogersville theatre, Rogersville, Tennessee, is a six day operation, forty per cent of the business on Saturday, and an average of 12.2 per cent on the other five days of the week.

The Court: What place was that?

A. Rogersville theatre, Rogersville, Tennessee.

Mr. Waller:

Q. Now, McKenzie, Tennessee, I believe is in the west part of the state?

A. Yes, sir.

Q. And you said you operated there seven days a week?

A. Yes.

Q. And your Saturday business was 40 per cent as compared with ten per cent daily average on the other days, including Sunday?

A. That is correct.

Q. Rogersville, Tennessee, is in the eastern part of the state, is it not?

[fol. 2760] A. Yes, sir.

Q. And Providence, Kentucky, and Greeneville, Kentucky, are in what parts of the State of Kentucky?

A. Central part, Providence is very near the northern part of Kentucky.

Q. Will you file that tabulation as defendants' exhibit number 152?

A. Yes, sir. I would like to call your attention to the fact that these figures represent an average of two years' business, 1939 and 1940.

Q. Mr. Stengel, have you had a similar tabulation prepared with reference to the new Crescent Amusement Company towns?

A. Yes, sir.

Q. I believe on Friday you stated that the average size the average population of your Rockwood towns and including affiliates, was twenty-three hundred, if you exclude Nashville and Gadsden, Alabama, from the Crescent towns; do you know the average population of these towns?

A. The Crescent towns?

Q. Yes, sir?

A. Is eighty-six hundred.

Q. Is the Western business in those towns a small proportion of the daily business collectively, proportion of the weekly business than in the small towns of the Rockwood Circuit?

[fol. 2761] A. You are speaking collectively of Crescent business?

Q. Yes.

A. It will run a few percentage points less, yes, sir.

Mr. Wright: Your Honor please, if we are going to have any figures on the whole business, let's have what the figures show.

Mr. Waller: I will withdraw that.

The Court: All right.

Mr. Waller:

Q. Did you prepare a tabulation of certain of the Crescent towns, giving the per cent in the same way as you did on the other towns?

A. Yes, sir.

Q. What towns have you used on that percentage?

A. Earlington, Kentucky, Greenville, Tennessee, Gallatin, Tennessee, Harriman, Tennessee, Lebanon, Tennessee, Paris, Tennessee.

Q. Are those towns in different sections of the state?

A. Yes, and when we prepared this list we tried to take a few from each geographical center.

Q. Will you give the per cent on those towns on the [fol. 2762] Saturday business as compared with the average daily business for the other days of the week, other than Saturday?

A. Earle theatre, Earlington, Kentucky, 43.3 per cent on Saturday, other days average 9.4 per cent.

The Court: A six day week?

A. The book-keeper that prepared this did not put the number of days' operation.

The Court: 9.4—it would be a seven day week.

A. The Capitol theatre at Greenville, Tennessee, 32.3 on Saturday, 13.5 per cent average on the other days.

Mr. Waller:

Q. Is that your A house in Greenville, Tennessee?

A. Yes, sir.

Q. All right, go ahead?

A. At the Palace theatre, Greenville, Tennessee, 47.6 on Saturday, 8.5 average on other days.

Q. Does that complete Greenville, Tennessee?

A. Yes, sir. The Lyric theatre at Gallatin, Tennessee, 29.2 per cent on Saturday, 14.1 per cent on the other days of the week. The Prince theatre, Harriman, Tennessee, which incidentally is the B house, 33.8 per cent on Saturday, 13.2 per cent average on the other days. The Princess [fol. 2763] theatre Harriman, Tennessee, 30.4 on Saturday, 13.9 per cent average on the other days of the week. The Princess theatre, Lebanon, Tennessee, 38.2 per cent on Saturday, 12.4 per cent average on the other days. The Capital theatre, Paris, Tennessee, 23.3 per cent on Saturday, 12.7 per cent on the other days of the week.

Q. That last must be a mistake? Isn't it?

A. It appears to me that it is too.

Q. Will you examine that?

A. May I verify that?

[fol. 2764] Q. Perhaps you had better take it and ask to be allowed to correct that later, if it is a mistake?

A. That is what I mean.

Q. Will you file that tabulation, subject to making that correction, if it appears necessary, as Defendant's Exhibit No. 153?

A. Yes.

Mr. Waller: We offer that in evidence.

Mr. Wright: If the Court please, this is objected to as wholly immaterial. There is no dispute, and there is no claim there were not any pictures at all.

Mr. Waller: The complaint is predicated on feature pictures, and we want to show the importance of Western pictures, as well as popcorn sales and screen advertising in this case.

The Court: All right, objection overruled.

Mr. Waller: We would like at this time to introduce, by stipulation, as Defendant's Exhibit No. 154 a tabulation showing the total releases of pictures by major companies and independent companies for the years 1934 to 1939, inclusive; also a breakdown with reference to major companies among the eight distributors who are mentioned in this case; this tabulation being made up of figures contained [fol. 2765] in the Film Daily Year Book for 1940. I understand that it is agreeable that that be stipulated.

Mr. Wright: The figures are correct, but we object to the Exhibit, because it has nothing whatsoever to do with the lawsuit or with the issues that we are trying here. It doesn't make any difference how many independent pictures were released in those years, we are not concerned with it, here.

Mr. Waller: We will ask that be made Defendant's Exhibit No. 154. That shows over 700 pictures annually.

Mr. Wright: There isn't any argument here that anybody, who wanted to run a theatre, can get something to project on any kind of screen to fill up the screen with, some sort of picture for his moving picture audience, without any difficulty whatsoever. That is all this tabulation tends to prove.

The Court: Overruled.

Mr. Raftery: The only objection we have to it, we don't want to be classified with the major companies; we still are one of the Little Three.

The Court: All right. Overrule the objection. Let it be admitted.

[fol. 2766] Mr. Waller: That shows that for 1939 the Major Companies made 383 releases and the independent companies made 373 releases. We won't read the comparisons for the other years, but they are along about the same line.

Q. Mr. Stengel, have the Crescent Amusement Company, the Rockwood Amusements, Inc., and its affiliates, followed the policy of exhibiting double features?

A. No sir, this a considered single feature territory.

Q. From your knowledge of the business of operating motion picture theatres, can you state what is the general practice throughout the country with reference to showing single features or double features in the mall towns?

Mr. Wright: Obviously, he is not competent to testify to that and I don't see what possible connection it has with what we are trying here, anyway.

The Court: How is that competent?

Mr. Raftery: It is competent, on this proposition: The charge is monopolization of supply. Anybody in the picture business knows general conditions throughout the country. The double feature territory uses up a lot more product than a single feature does. Obviously, playing single features in these towns makes a great amount of film avail-[fol. 2767] able for anybody else who wants it. The statement as to double features or lack of double features is competent to show the impossibility of monopolization of supply. That is the issue the Government is talking about.

Mr. Wright: Even taking Mr. Raftery's statement at its face value, how could what happens in another part of the country affect the monopolization of film here?

The Court: How does the supply of film in other territory affect Crescent in this State?

Mr. Wright: That, I say, is the issue here, evidence as to what was available in this territory, what has happened here, not what happened in other parts of the United States.

The Court: That is just the reason I am inclined to sustain the objection.

Mr. Waller: Let me state what I was intending to prove, which was simply this: We have shown there were 761 releases in 1939. We want to show that the necessity for that large number of releases is the fact that in many parts of the country where they have double feature policy in effect,

those pictures are shown. They are not things that cannot [fol. 2768] be shown, as Mr. Wright seems to suggest, and they are not produced for the fun of it. They are available for exhibition.

Mr. Wright: That is not what you are offering to prove by this witness, you couldn't possibly prove by this witness those other pictures, the conditions and extent to which they are exhibited, that is something that is completely outside of this trial. If you are undertaking to show what happens to the balance of the pictures on this list in other parts of the United States, Mr. Stengel obviously is incompetent to give testimony on that point.

The Court: I sustain the objection.

Mr. Waller:

Q. Mr. Stengel, on Saturday——

Mr. Raftery: We reserve the right to offer the evidence of some witnesses that we are going to call on the question of double feature. We are trying to get out of this case the false situation of monopolization of supply that is projected into it by Mr. Wright.

The Court: The question is, whether or not films have been monopolized in the section served by the Crescent, in this territory.

[fol. 2769] Mr. Raftery: That is the monopolization of supply that we are talking about, whether or not they have a local monopolization of supply in the theatres in those towns. The Government charges that the normal flow of supply of motion pictures has been slowed up and in that way the Sherman Act has been violated.

Mr. Wright: We have not given——

Mr. Raftery: I want to finish my statement.

Mr. Wright: Go ahead.

Mr. Raftery: Mr. Waller is offering evidence on the numerically available pictures generally released in the United States and available for exhibition.

The Court: Well, I have admitted that evidence.

Mr. Raftery: And the other step following it is to show, that generally, I believe it will run 80 per cent of the country, geographically, double features are the rule rather than the exception, therefore, twice as many features are used up in that type of territory, which is some evidence that those other pictures are made. I expect so show that.

The Court: You say used up; it wouldn't prevent them from being shown in other territory by Crescent or anybody [fol. 2770] else. Whenever you show a picture, you don't use it up.

Mr. Raftery: You use it up so far as exhibition value is concerned, which is the only thing that is of value.

The Court: What difference does it make in that exhibition value as to whether or not a certain film was to be shown in the Crescent Theatre which had previously been shown as a double feature in Cleveland, Ohio or Newark, New Jersey, or some other place?

Mr. Raftery: That is not the point for which this evidence is offered. The evidence is merely offered to show that there is available pictures that are generally being shown throughout most of the country.

The Court: I thought the evidence was offered for the purpose of showing there were not available films because it was used up by these double feature films.

Mr. Raftery: No, just to the contrary. Mr. Wright has said he is willing to concede that any theatre can get all the pictures it wants; he is willing to concede that, but he says, that the Crescent people have the choice of films. Now, [fol. 2771] the evidence is offered to show that those pictures are made to be shown and they are generally shown in the double feature territories by some exhibitors or all exhibitors.

The Court: What difference does that make?

Mr. Raftery: It makes this difference, that there could not be a monopolization of supply if there were 700 pictures, and if Crescent uses 4 a week, or 200 a year out of the 700, you have got 500 pictures still available to anybody else that wants to go in and open up a theatre in any theatre towns, that there are usable pictures available. That is the only purpose of the offer, from the Distributors' standpoint.

Mr. Wright: Even if they prove it, which he has not obviously attempted to prove here, that every one of those independent productions are shown as a part of a double feature program somewhere else, that wouldn't tend to prove at all that any one of those pictures was or ever could be suitable for a single-feature film in the Crescent towns in the particular territory that we are concerned with here. Taking everything he has said as having been proven, it would [fol. 2772] not have the slightest relevancy to the issues that

we are trying here, the monopolization of pictures for exhibition in this particular territory.

Mr. Waller:

Q. Mr. Stengel on Saturdays do you sometimes play both a feature picture and a Western feature?

A. Yes, in most of our theatres, we double-feature on Saturdays. One of the principal reasons for that is, this: Western pictures are very short in length of time they run, about 60 minutes or 63 minutes and we try to work out a two-hour show on all days of the week.

The Court: Then these figures that you have given about the percentage of your Saturday's business, that is not based entirely, then, on Western films?

A. No, it is based on a Western program.

The Court: What do you mean by a Western program? You mean one Western picture shown alongside of a feature picture?

A. Yes sir.

Mr. Waller:

Q. What I wanted to ask you in that connection, Mr. Stengel, is what has been your experience with reference to the importance of a Western picture for a program?

[fol. 2773] Mr. Wright: That, if the Court please, is purely a conclusion. If he is going to testify here, as evidently he does, that the feature helped to attract the audience there or he wouldn't run the picture with the Western on Saturday, therefore he is not competent to show the extent to which the Western attracts his patrons or the extent to which the other feature attracts patrons.

The Court: Well, I will see what his idea is about it.

A. Do you want to know why we run both pictures, is that it?

Q. Yes, why you run Westerns and why you run the other and then you can state anything else that would elucidate the question?

A. We have tried to run pictures other than Westerns on Saturdays and we haven't been able to do nearly the business that we have running the Western and the feature. Then we have run Westerns alone without feature pictures,

and we have put in short subjects to add to the length of our show, the idea being that we would like to build up about a two-hour show. Within the last three or four years, it has been very hard to get slapstick comedies. Some of the producers are getting away from making two-reel comedies, they make only short subjects. Slapstick comedies go with Westerns on Saturday, they are an ideal bill of [fol. 2774] fare, because they please children and they please people that come into the theatre and that is all you want to do, and they are long enough so that you can put several of them in there and build up a show of an hour and forty five minutes or two hours. Now, we went into the double feature on Saturday for two reasons. The first, because we couldn't get what we thought was desirable short subjects. [fol. 2775] So we had to build up our time and we put a second picture in there. Another reason that we put it in there, we hoped that it would attract more patronage. I can truthfully say that it has not, as far as I can see and we have been doing it about two years, I believe. I can't see where it has attracted a great deal of additional patronage; maybe five per cent, maybe more. By doing that, of course, you have got two ways of getting people into your theatre.

Q. What character of feature picture do you usually play with the Western where you play two pictures on Saturday?

A. Pictures like "The Jones Family" or a Mr. Motto series, a picture without box office value.

Q. Now, in these towns where you have no competition, Mr. Stengel, and where you have never had any competition what is the policy with reference to showing pictures of only a few distributors or of many distributors?

A. Well, we always try to buy, to do business with every company that we can and the only way you can do that without overbuying and paying for pictures that you don't use is to make short commitments.

Q. You mean on contract that gives you choice of pictures?

A. Yes sir.

Q. Now, why do you do that in these small towns where you have no competition?

A. Well, we can make more money by doing it and by virtue of making more money, of course, the public is better [fol. 2776] satisfied, or they wouldn't come to the theatre.

Q. Well, do you try to show the best pictures of each producer?

A. Certainly.

Q. And do you do that in towns where you have never even heard a rumor of competition?

A. Yes, in every town.

Q. Is the purpose of that to tie up the product so as to keep out competition?

A. No sir.

Q. Now, Mr. Stengel, something has been said, a great deal has been said in this case about the Dixie Theatre at East Gadsden, Alabama. Has the Crescent Amusement Company to your knowledge ever asked for any clearance over the Dixie Theatre or any priority of run over the Dixie Theatre?

A. Well, I have negotiated or rather sat in with Mr. Sudekum on every deal that has been made for the Crescent Amusement Company for the last three years—that I am sure of, as to the time, and we have never mentioned, either collectively or myself individually, the East Gadsden Theatre and I didn't know anything about it—I knew there was a theatre there but just thought it was a suburban theatre and never did know anything about it until this lawsuit.

Q. Now, you have examined these Dixie Theatre contracts that have been put in evidence in this case and are there any of them that contain any clearance or priority [fol. 2777] of run in favor of Alabama City over East Gadsden?

Mr. Wright: Now, if the Court please, the contracts speak for themselves.

Mr. Waller: Well, that is a preliminary question.

The Court: Well, that is true but he is asking, has he looked at them to see whether or not they do.

Mr. Waller: I think we can stipulate the Loews contract is——

Mr. Wright: No, we won't stipulate that they show a thing but what they do show. They all show first run Ritz in Alabama City. It is definitely created as a prior run to the second run that is sold to the Dixie in East Gadsden.

Mr. Waller: In the East Gadsden contract?

Mr. Wright: The East Gadsden contract provides for second or subsequent run. The Ritz in Alabama City contract provides for first run in Alabama City.

Mr. Waller:

Q. Well, let me ask you this: Is Alabama City set up in your film deals as a separate situation or as a part of Gadsden?

Mr. Wright: That is a conclusion again. It appears how [fol. 2778] it is set up on the face of the contracts.

Mr. Waller: If it is set up as a separate town, of course, every town has a first run, if it has only one theatre.

The Court: Go ahead.

A. In our negotiations in making film contracts we have always treated Gadsden, Alabama and Alabama City as two separate towns and have bought for Alabama City as a separate situation, and have bought for it as first run as an independent town, not an independent town but as a separate town.

Mr. Waller:

Q. Is that a separate situation from Gadsden?

A. Yes sir.

Q. Now, have you ever asked for any clearance of Alabama City over East Gadsden?

A. No, we haven't.

Q. Did you notice Loews' contract with the Dixie Theatre in East Gadsden that is in evidence in this case?

A. Yes sir.

Q. Where the East Gadsden contract or the Dixie Theatre contract stated that the run should be subsequent to Alabama City?

A. Yes sir.

Q. Did you ask for that or know anything about it until the contract was produced here?

A. We did not.

[fol. 2779] By the Court:

Q. Is that Loews?

Mr. Waller: Loews, yes sir.

A. Mr. Waller, I would like to ask a question, if I may.

Q. All right.

A. You are talking about negotiations for pictures, aren't you?

Q. Yes.

A. No sir, we have never done that.

Q. Is it an uncommon practice for a film company on its own initiative to require intervals between the exhibition of some pictures in the same or neighboring communities?

A. Yes sir, and with further regard to Loews——

Q. I say, is it an uncommon practice?

A. No, it is not.

Q. Now, can you give any illustrations when that has been done and why it is done?

A. You mean hold subsequent run behind first run?

Q. Yes sir.

A. Well, in Nashville, for example, Fox holds our second run sixty days behind our first run. Do you want some more?

Q. Yes sir.

A. Paramount holds us back a certain length of time. The idea is to protect the revenue from other first run situations.

Q. Is that done at your request or on the initiative of the film company?

[fol. 2780] A. Well, I think in those particular cases that I have cited it is done at their request. However, our practice is in small towns where we have two theatres, where we run a picture a second time in the town, we hold it back also.

Q. Now, Mr. Stengel, to illustrate, do you now have—I mean does the Crescent Amusement Company now have the only theatre in Earlington, Kentucky as well as the theatre in Madisonville, Kentucky?

A. Yes sir.

Q. Do you play Madisonville ahead of Earlington?

A. Madisonville plays ahead of Earlington.

By the Court:

Q. How much ahead?

A. I can tell you by giving you some specific pictures and the dates of them.

Q. Well, just approximately.

A. The general booking set-up is from thirty to sixty days, an average of about forty five days.

By Mr. Waller:

Q. Mr. Stengel, in the three franchises that have been referred to in this case, the Paramount franchise, the Fox Franchise and the Warner Brothers franchise, did you have anything to do with the negotiation of these repeat run clauses in those franchises?

A. Yes sir, I did.

[fol. 2781] Q. Was that one of the details that you worked out with the film companies?

A. Yes sir.

Q. What was your reason for wanting those repeat run clauses?

A. The principal reason was that you can make more money in repeating a big picture in a town than you can playing a picture that doesn't have any box office value.

Q. Have you ever had any difficulty in gettting a film company to agree to permit you to repeat a picture where you had no repeat run clause in your contract?

A. Well, I don't think that they would have prohibited us from using it but we couldn't get together as to the money which we wanted to pay.

Q. Well, is it always then a question of price?

A. Yes sir.

Q. When you want to repeat some big picture?

A. That has always been our problem.

Q. Then if you don't have a definite repeat run clause in your contract and want to repeat a picture, what is the procedure?

By the Court:

Q. Well, you have to negotiate as to price?

A. That is right.

By Mr. Waller:

Q. Then, Mr. Stengel, when you negotiated these repeat run clauses in these franchises was there a definite price [fol. 2782] basis fixed?

A. Yes sir, there was.

Q. Did you have any other purpose or motive in asking for those repeat run clauses other than what you have stated?

A. Yes sir, we had this thought definitely in mind, that we were paying out a large sum of money to these people each

year and in some cases with an accumulated increase and we wanted a contract that we could get along with and we insisted on the repeat run clause, asked for one and tried every way that we knew how to get clauses in the contracts that would help us make money.

Q. I don't know whether you understood the question but I will ask you to state again; Then what purpose or purposes did you have in mind in insisting upon the repeat run clauses?

A. To repeat pictures so that we could play them back a second time in the towns. You see, most of our theatres are in one-theatre towns.

Q. What I am getting at is, was it a question of fixing the price in advance or what?

A. Oh yes, that was the big thought.

Q. Did you have any purpose or intent to try to tie up the product to prevent some competitor from getting it?

A. No.

Q. Was that ever discussed between you and any of these film companies?

[fol. 2783] A. Yes sir, it was discussed with Fox.

Q. Well, did you get a letter from Fox, from Paul Wilson?

A. Yes sir.

Mr. Waller: (To Mr. Wright.) Do you have that letter, Mr. Wright?

(Letter handed to counsel.)

Q. I have here a lettter, which I understand was furnished to the Government by the Twentieth Century Fox Film Corporation and which I understand the Government wants introduced in evidence and I will be glad to stipulate and have it marked as the next Government exhibit.

Mr. Wright: I want to add that that letter wasn't furnished until after Mr. Wilson testified.

Mr. Waller: Yes.

Mr. Wright: You can offer that if you want to offer it.

Mr. Waller: I understood you wanted to. I would rather have it go in as a Government exhibit, if you want it.

Mr. Wright: Well, I will of-er it as an exhibit when it comes our turn.

Mr. Waller: Did you state to me the other afternoon that you wanted it stipulated as a Government exhibit?

[fol. 2784] Mr. Wright: I stated I wanted to offer it as a Government Exhibit and I will offer it at the appropriate time.

Mr. Waller: I told him I would stipulate about it and I am stipulating—if he doesn't want it, I will put it in as a defendant's exhibit. It don't make any difference which one it goes in as.

The Court: Well, it is immaterial to me.

[fol. 2785] The Clerk: Government Exhibit 360 and Defendants Exhibit 155.

The Court: All right; we will have a short recess.

(Recess.)

Resumption after Recess:

Mr. Waller: I will read this letter, your Honor.

The Court: All right; read it.

Mr. Waller: It is dated November 22, 1939: (Reading:)

"Mr. Kermit C. Stengel, Rockwood Amusements, Inc., Nashville, Tenn.

DEAR KERMIT:

Regarding letter received from Mr. Armistead dated November 7 attached to your letter of November 9 and in accordance with my letter of October 20, the Company will not accept a clause setting up a basis for the privilege to use repeat runs, because this would virtually set up a second run with no obligations or commitments on the exhibitor's part to use the pictures. [fol. 2786] As a matter of fact we are at this time facing the possibility of a law-suit on a similar clause in a situation where the town has a population of 20,000, exhibitor played three pictures repeat run and did not purchase second run, opposition went into the town, and the exhibitor maintains that we have no right to sell second run to the opposition.

As Mr. Ballance explained to Mr. Sudekum during his last telephone conversation with him, we would submit contract covering twenty-six pictures in towns requested, and these second runs were the particular situations that you gave me over the telephone for which quotations were attached to my letter of October 28.

I assure you that Mr. Ballance has looked into this matter from every angle and he feels that the clause just cannot be inserted.

Very truly yours,"

This is a carbon copy, with initials "PSW."

Did you receive that letter from Mr. Paul Wilson?

A. Yes, sir.

The Court: Has that been marked, what is the number? [fol. 2787] The Clerk: Government Exhibit 360, Defendants Exhibit No. 155.

Mr. Waller:

Q. Now, Mr. Stengel, when you received that letter, did the repeat run clause that you have been discussing include the clause which is now the last sentence in Article 8 of the Fox franchise reading as follows: "It is further understood and agreed that if during the term of this franchise a competitive theater operates in any village, city or town listed on the attached deal sheets (where a definite second-run isn't sold) the exhibitors shall not have the right to exhibit any feature motion pictures as a repeat run."

A. No, sir.

Q. When you received this letter from Mr. Wilson, did you take it up with him in any way to find out exactly what he was objecting to?

A. I think I called him up over the telephone and told him that my interpretation of the repeat run clause certainly did not prohibit him from selling second-run; and he says, Well, we just don't want it in there. Now, you must take into consideration the fact that we hadn't made a definite offer on that; the only way we could get together in the 52 picture deal was that we had to give up twenty per cent of the cancellations; that is one point to illustrate how hard we were trading, and I think this letter was more or less a feature; and I called him and he said no, he wouldn't [fol. 2788] give us the right; and I talked to Mr. Armistead and told him why we wanted the repeat run in there; and told him as far as we are concerned, if they want to put a clause in there whenever we get competition that clause is void, that is perfectly all right with us; and he said, I see nothing wrong in that, and he in turn wrote the letter, and I signed it and sent it to Mr. Wilson.

Q. Is that how this clause got in Article 8?

A. Yes, sir.

Q. Now, what was the period of this correspondence and negotiations with Fox with reference to the time of the Paramount repeat clause and the modification of it? In other words, your letter here is dated November 22, 1939, from Mr. Wilson.

A. Oh, that was a long time afterwards.

Q. Did you have any objection at all to the clause providing that the repeat run privilege would be void in case of competition?

A. No; it was put in at our suggestion.

Q. Did anybody connected with Paramount ever suggest a similar clause in that franchise?

A. Not to my knowledge or recollection.

Q. Now, with reference to franchises generally, Mr. Stengel, and to these franchises that have been referred to, [fol. 2789] are there any advantages to an exhibitor of having a deal for more than one year as compared with a deal for only one year?

A. Yes, sir, there are.

Q. Well, what are they?

A. Well, it assures you, gives you assurance of a supply of some product at the beginning of the season; and when you start trading at the beginning of the selling season with the different distributors or their representatives until you have closed your first deal, why, all of them are sort of reluctant to make a deal because they feel they can hold out and get better terms. How that information gets out I don't know; but the minute you close with two or three or three or four of them it is much easier to negotiate with them.

Q. How is it with reference to your time and the expense, is the negotiating for films an important item in your business?

A. Certainly yes, sir.

Q. Is there any expense saved by getting a deal for more than one year as compared with only one year?

A. Yes, sir; take my own case as an example: It takes almost sixty per cent of my time from September through December to negotiate film deals.

Q. Now, how about the time and expense of the one year [fol. 2790] deal as compared with a one picture deal? Have you had that experience?

A. Yes, quite often, we have negotiated for one film—well, not quite often, but occasionally, we have negotiated for one picture.

Q. Did the company sometimes hold out some exceptional picture out of that?

A. Yes, sir; there is a road-show clause, is my understanding, in every film contract.

Q. What do you mean by road show clause?

A. The distributor has the privilege of withdrawing a picture that looks like it is going to make money; and then again, they may have a picture made by some outside producer which would be outside of the product covered under your contract.

Q. Then, if you have a picture like that which is withdrawn from your contract, you have negotiated for that picture individually?

A. Yes, that is true.

Q. Now, have you ever had any experience about trading for blocks of five?

A. Just one.

Q. Well, what would you say as to the relative advantages or disadvantages of a one-year deal as compared with a five block deal?

[fol. 2791] Mr. Wright: May it please the Court, I don't see that that is relevant here; that would have been true——

The Court: You have been offering that all along, haven't you?

Mr. Raftery: No, I have been trying to show the Big Five are as good as any.

Mr. Waller: It is all a relevant proposition, whether it is only one year or two or more years or a block of five, it is all a matter of experience.

The Court: Well, I don't know whether he has ever had any experience in buying blocks of five or not.

Mr. Waller: He has stated that he had.

Mr. Wright: Well, if he has, somebody has violated that decree.

Mr. Waller: You mean you can't negotiate except for one?

Mr. Raftery: It becomes "must" on the first of September; that is the only distinction.

[fol. 2792] Mr. Waller:

Q. Did you buy a block of five for the Paramount Theater here in Nashville, about a week ago?

A. In a block of five?

Q. Yes?

A. Yes.

Q. In a block of five you know in advance what each picture is, do you, Mr. Stengel?

A. And you are supposed to but in order to know you have to sit down and look after them and find then what I think about the box office quality of the picture; whether I have seen it, how it appeals to me, is no criterion as to how it is going to appeal to people from whom we get our money at the box office.

Q. Comparing a two or three year deal with the one year deal, is there, from the standpoint of the distributor, an advantage; in other words, is that a consideration determining whether you would prefer a one year deal or a deal for more than one year?

A. You mean if you knew what the pictures were?

Q. No; I say, as a matter of practice, do you know any more in a one year deal than you do in a three year deal?

A. No, you don't—Well, to a certain extent; the companies prepare a prospectus prior to the selling season, of [fol. 2793] what they are going to release for the ensuing fall. Take, for example, Paramount: two or three years ago they announced they were going to release five or six outstanding pictures, and at the end of the year they withheld them and released them the following year.

Q. Now, in these three instances where you negotiated or helped to negotiate franchises for Crescent and also negotiated franchises with the same distributors for Rockwood and its affiliates, what was the sequence with reference to the Crescent deal and the Rockwood deal?

Mr. Wright: I don't see the importance to show how he covered those negotiations in some detail; I don't see the importance of it.

Mr. Waller: I was leading up to something else, your Honor. I am sorry I repeated myself.

Q. In any of those cases was there any suggestion by you to the distributor that the Crescent deal would be abandoned if the Rockwood deal was not made?

A. No, sir; on the contract most of the time they would say we would like to make a deal for the Rockwood towns.

Q. Well, was there any suggestion by you to any of these distributors that the Rockwood deal would be abandoned [fol. 2794] if the Crescent deal wasn't approved?

A. No, sir.

Q. It appears that some of these franchises had been actually executed late in the season, after the following season had started, is that correct?

A. You mean formally signed?

Q. Yes.

A. That is true.

Q. Did that prevent your companies from playing those pictures, or how was that handled?

A. Oh no; the particular consideration in any film deal, whether it be a one year deal or a franchise, is the amount of money involved, and in our case, due to the fact that we have so many different theaters, and it would necessitate signing an application for each one of those theaters, to eliminate that work, we would write down on a slip of paper the things that we had agreed to, and then ordinarily, we were dealing with the District Manager, and the District Manager would call his New York office, and in the event the New York representative is here, he would see what deal could be made and say go ahead, and start playing; now, we will agree on the clearance and we will agree on these other things; in no case has any deal been thrown out after [fol. 2795] we have once agreed on the amount of money to be paid, and in no case has the deal been thrown out because we agree on the other terms included in the deal.

[fol. 2796] Q. There has been something in the evidence about negotiations for a franchise with Loew's and about the failure of Crescent to make a deal for the 1939-40 product of Loew's; did you participate in the negotiations with Loew's for the 1939-40 product on behalf of the Crescent Company?

A. I did, yes, sir.

Q. What was the situation with respect to that suggested franchise, what happened about that?

A. Well the Metro representatives came to Nashville to see us, I believe Mr. Kesnick and Mr. Avey, Mr. Kesnick stating that for the 1939-40 product they were going to want thirty-six percentage pictures. In the past or previous season we had bought flat rental. We said we could not

do anything about that. These negotiations went on over a period of time. Finally late in the season may be in December or some time in January, they kept insisting on percentage pictures, and they got down to twenty-four and fourteen. We said, we can't see anything like that, it is getting late, we will just make a five year franchise with you, then may be we can get together on something like that, and they said, no, they were not interested in making any five year franchise. Well, when they said that, that immediately looked like they were coming around, so I said, I said on the five year franchise business, hoping if their [fol. 2797] policy was against making a five year franchise, we could trade and traffic along, asking for certain things in the deal, and we went on with the deal, I would tell them that we were not going to take that deal and they asking us to enter into some other deal, and then it was that we began to talk a one year deal, a two year deal.

Q. You mean 1939-40 and 1940-41?

A. That is right.

Q. Were those negotiations prolonged by you in order to keep any independents from getting Loew's pictures?

Mr. Wright: Your Honor please, I think that is a pure conclusion.

The Court: Overruled.

Mr. Waller:

Q. Go ahead?

A. Well, we did not know whether they were going to sell anybody or not, and we did not tell them not to sell anybody.

Q. Did they consult you about it at all?

A. No, sir, they did not.

Q. On Friday, I believe the United Artists' deals were mentioned, when the Rockwood towns and the Crescent towns were included in the same deal; will you explain how [fol. 2798] that came about?

A. Well the history of the United Artists' negotiations or contracts with the Crescent Amusement Company have been for a lump sum of money.

Q. Very well?

A. There was something at that time, whether Loew's at least have a contract with them, when I came with the company, and the first time that I sat in on the United

Artists' deal, there was a considerable argument with regard to the amount of monty that would be paid for a picture or a number of pictures, each picture carrying its own price, so during the course of the negotiations—this was back when Rockwood just had probably three or four towns, and we will say—taking a hypothetical figure, at least fifteen hundred dollars, and that we would say we would only be willing to pay twelve hundred for both, Crescent Amusement Company possibly then he figured on that, then we couldn't get together, looked like we were at loggerheads as to how to proceed, if you will give us more run we will pay you that much money, that is how it started.

Q. In other words, instead of coming down in the money, you would go up in the number of situations?

A. That is right.

Q. So on or about that time, you included the Rockwood towns with the Crescent towns?

[fol. 2799] A. That is right.

Q. Did that procedure come up on any subsequent deals?

A. Yes, sir, it regularly kept on, in fact I made that part of the United Artists' deals, by that I mean handled the original negotiations, and submitted the deal, so far as the Crescent Amusement Company was concerned, to Mr. Sudekum, after we had gotten pretty well together in the negotiations.

Q. Now, Mr. Stengel, there has been some testimony in the case in regard to the purchase by Rockwood of the theatre at McKenzie, Tennessee; when was your first trip to McKenzie with regard to the theatre at that place, and how did you happen to go?

A. Well I couldn't be sure of the date, but we received a letter from Mr. Dunlap, who was the Worshipful Grand Master of the Masonic Lodge at McKenzie, to the effect that the lodge owned the theatre and was interested in securing a new tenant for it. That was the substance of the letter. I went on down there and talked with Mr. Dunlap, and he was working at a grocery company, wholesale grocery company, and we asked him what was wrong with his present tenant, and he told me that the present tenant was there in arrears with his rent, so he wanted us to make an offer as I recall, and I told him—finally asked him what he wanted and he told me some figure, and I said [fol. 2800] we would not be interested in making any deal,

with him, and I said not until we go and talk with the man that was running the theatre. Then I went over and talked with Mr. Moore.

Q. Did you talk with Mr. Moore as to the rentals, and whether he was in arrears in his rentals, as Mr. Dunlap had stated?

A. I think I told Mr. Moore exactly as to the subject matter of the conversation I had had with Mr. Dunlap, and Mr. Moore told me he was doing a little trading himself, that he wanted to make a lease, wanted to make a better lease with the masonic organization, that the organization was hard pressed for money and he thought if he played his cards closely he might be able to make a better deal, and come out on it.

Q. Was that the nature of that conversation? Or conference with Moore, or what happened?

A. I do not know if all this happened in one conversation, but that happened in a very short period of time.

Q. You mean you made two trips to McKenzie or one trip?

A. I think I made two trips, because I went to see this building, that this building was going to be put up for sale, and then that Mr. Moore hadn't told me the whole story, and some time later I got a letter from one of the banks here in Nashville telling me about this building being put [fol. 2801] up for sale, and anyhow the subject matter of these two conversations amounted to this, Doug Moore said this, I am going to make a deal with these people, and when I do I am going to remodel the theatre and it will be a nice theatre, as nice as anything here. I told him that it looked to me like his theatre was very poor and the people were not getting what they deserved, and if he did not build a theatre, that I would come in there or somebody else was, because the people were demanding the theatre. I had been through there about a year before that on a booster trip, or about that time, one of the Nashville boosters, and some one had talked to me about it. At the time I didn't pay any attention to it.

Q. Did you shake hands with Mr. Moore about it?

A. I told Doug we were not interested in running him out of business, if his idea was to go ahead and build a new theatre, and explained this that we were not interested in coming in but of course we learned, in the mean time that

Mr. Red Moore, his brother, had asked me not to come into the town against him.

Q. That is Mr. Doug Moore's brother who lives in Nashville?

A. Yes, sir.

Q. Communicated with you, or Mr. Sudekum?

A. Yes, sir, with me.

[fol. 2802] Q. Mr. Doug Moore, was he working at the theatre business full time, or was he working at the post office, and looking after the theatre part of the time?

A. He was a mail carrier, he looked after the theatre on part time.

Q. His full time was not taken up with the theatre?

A. No, sir, he was a mail carrier.

Q. What did you find out or understand that Mr. Moore was about to do with respect to making this an up to date theatre?

A. Yes, sir, I did, I found out that he had bought some Booth equipment, and acquired some simplex machines, which is a portable type, and he had taken some of the equipment out of the auditorium, and I believe that is about what he did to the theatre, because he told me at the time of our negotiations that he had spent about two thousand dollars remodeling it, the theatre, and you can't do much more than that for two thousand dollars. The seats were still veneer seats, and I know there are not any rest room facilities in the theatre.

Q. What did you do as to the situation?

A. What do you mean by what we did? What we did next?

Q. Yes, what did you do next?

A. We had rented a store on the square that was about twenty-five feet wide and about seventy-five feet in depth, [fol. 2803] and had made inquiry as to the adjoining store, about the building of a theatre, the room you need, the depth, there wasn't building room depth enough, in the theatre business you need a minimum of about a hundred and twenty, a hundred and ten to a hundred and twenty feet, and you prefer about a hundred and thirty feet for the depth, and when we had looked around, that was what I wanted, we couldn't find that, we looked around, we wanted to stay on the square, so finally we did find a piece of property which fronted on the square that was occupied by the Lovelace Farmer Grocery Company.

Q. In the meantime, Mr. Stengel, before you bought that piece of property, how did you buy it, from Mr. Moore in McKenzie?

A. You mean how it came about?

Q. Yes, I want to know how it came about, first?

A. Well as I say, I left Mr. Moore in McKenzie, I believe it was about a year before we went back in town, and as I say he hadn't done any of the remodelling that I thought he was going to do, and we thought that he had been going to expand the theatre, and we thought we could make some money here, but we went on through there and did not contact Mr. Moore, and rented a building at that time, we tried to get the other building but we couldn't. However in a few days Doug Moore came to Nashville and said [fol. 2804] he was interested in selling out. He suggested a partnership, and I told him I thought it was too small for a partnership and we were not interested in the partnership, asked him what he wanted and he said, Make me an offer, and I said, Doug, I couldn't put a value on your personal property, your personal holdings, you will have to decide for yourself what it is worth, you will have to decide yourself what it is worth. And I asked him how much he had spent on your building and how much is it worth, and he took his pencil and figured it out and we paid him somewhere between eight and nine thousand dollars, and we paid him his price.

Q. You paid him the price he asked you?

A. Yes, sir.

Q. After that you stayed in McKenzie, or what was done?

A. Yes, sir, got the building that housed the McKenzie theatre that is Mr. Moore's theatre was there, with a very poor location, at the end of an alley, a dead end street, and we knew we could not depend on any transient business, it was very hard to send out any lobby displays, and ask the public up and so we wanted to get out on the square, and bought this building, and the property cost us seventy-five hundred dollars, as I recall.

Q. When did you buy that property?

A. I do not remember exactly when we bought Mr. Moore's property, I think, I am not sure of the exact date, [fol. 2805] that would be in 1939.

Q. All right, what delayed the construction?

A. That is right, October, 1939.

Q. What delayed the construction of your theatre?

A. Mr. Ben Maddox or Huntingdon, our attorney, had served notice on this grocery company, Lovelace, Farmer Grocery Company, thirty days, giving them thirty days to evacuate the building, and it seemed impossible and being delayed, they couldn't find another location, so on and so forth, we did not get possession of the building until about a year later, or longer, and we started work on the theatre, and opened the theatre here a few weeks ago.

[fol. 2806] Mr. Waller:

Q. I will pass you a photograph and ask you if that is a picture of the Park Theatre, a picture of the new theatre in McKenzie?

A. Yes sir, it is.

Mr. Waller: We offer that as Defendant's Exhibit No. 156.

Mr. Wright: The same thing is true of this photograph that is true of the others showing what the picture is like in relation to any other building, to give some idea, they crowd the camera right in front of it to show the theatre and it looks like it is new and magnificent, whereas, if you ever see a picture of that as it really is, you would not be nearly so impressed as you would be by those pictures. It shows what can be done when you introduce a photograph, when you don't introduce anybody to show the true condition. It is possible to introduce photographs in a way to mislead and give a misleading picture of the theatre that it represents, just as they single out a theatre in Earlington and took a picture of that two years after it was closed with the windows broke. I don't think this sort of evidence is competent to prove what is is here offered to prove, even if the proof had some relation to the issues of [fol. 2807] the case, which I don't think it has.

The Court: Overruled.

Mr. Waller:

Q. Mr. Stengel, while Mr. Moore was still operating the theatre at McKenzie, had the Rockwood company acquired the theatre in Huntingdon, Tennessee?

A. Yes sir.

Q. From whom was that theatre acquired?

A. Rockwood acquired it from Strand Enterprises.

Q. Had Strand Enterprises acquired it shortly prior to that time from the former owner?

A. Yes sir, from Mrs. Linnie Carter.

Q. I will pass you two photographs, one taken with the camera close up and the other taken with the camera quite a distance away, of the Huntingdon Theatre, the Court Theatre, which Mr. Wright says is a perfect example of what he was talking about and will ask you if you can identify those pictures as to what they are taken of and what the building is?

A. This is the Court Theatre in Huntingdon, Tennessee, and it was evidently taken from the Court House steps.

Q. Which one?

A. The one that includes several other buildings.

Q. And the other one was taken close up?

[fol. 2808] A. The other one was taken close up.

Mr. Waller: We offer those two pictures as Defendant's Exhibits Nos. 157 and 158, respectively.

Q. I also pass you two photographs of a building, one close up and one from a distance, and will ask you if you can identify them?

A. This is the Masonic Building in McKenzie, Tennessee, the lower floor of which is used for the theatre.

Q. Is that the Moore Theatre that you talking about?

A. Yes sir. The picture——

Mr. Waller: We offer those as Defendant's Exhibits Nos. 159 and 160, respectively.

Mr. Wright: We have the general objection to all of these photographs as being irrelevant and immaterial.

The Court: All right, Overruled.

Mr. Waller:

Q. As to the two towns, McKenzie and Huntingdon, Mr. Stengel, from your experience with those two towns, can you make any comparison between them as to being theatre towns, that is, from the standpoint of operating a theatre in those two towns?

Mr. Wright: I don't follow the purpose of this.

The Court: What is the purpose?

[fol. 2809] Mr. Waller: The Government brought the situation in when they introduced proof about Huntingdon getting clearance over McKenzie.

Mr. Wright: How would this information that he is asking him to give, possibly bear on that question of clearance?

The Court: What is the question?

Mr. Waller: I asked him if he could compare the two towns, McKenzie and Huntingdon as theatre towns, how they compare?

The Court: They might compare on the question of clearance from the defendant's standpoint by showing that.

A. May be the easiest way to answer the question would be to tell you that, from the time we acquired the McKenzie theatre until we opened the new McKenzie theatre, that we grossed more money in the Court Theatre at Huntingdon, than we did in McKenzie.

Mr. Waller:

Q. Is that true although McKenzie is a larger town than Huntingdon?

A. Yes.

Q. I believe Huntingdon is the County Seat of Carroll County?

A. Yes.

[fol. 2810] Q. And McKenzie is in the same county?

A. Yes.

Q. Does a town which is a county seat have an advantage over another town in the same county as a theatre town?

A. Yes, it does, because, first, it has the advantage of First Monday, and your Quarterly Court, and then on Saturday, the country people come in there to attend to their business and, naturally, while they are there in town, they bring all the children and they go to a picture—at least, we hope they do.

Q. What do you mean by First Monday?

A. First Monday is quite often called Mule Day. It is one of the best show days in the year in a number of communities. People come in from far and near.

The Court: That is First Monday in every month?

A. Well, it may be.

Mr. Waller:

Q. You mean by First Monday, the First monday in each month?

The Court: I know as much about that as he does.

A. Maybe more.

The Court: The meeting of quarterly county court is also on that day, on First Monday.

Mr. Waller:

Q. Mr. Stengel, the Government introduced evidence to the effect that the Rockwood Company purchased the Selba [fol. 2811] theatre in Central City, Kentucky. Will you explain how that came about, how the negotiations started and what the result was.

A. The people that were running the Selba Theatre, which was Selba Amusement Company and was owned, in the majority, by the two Martins, Guy Martin and his brother, they told us that they were losing money and they solicited a number of people to come into Central City and take that building off their hands, that is, lease it from them. And so, we went on in there and there never was any argument about who was going to take it. We told them that we would take it, we didn't know what we could afford to pay, we didn't know whether the town could get along. But we worked out with them a first run something like this; we would take the lease on a two-year trial basis, with an option of ten years and any equipment that we put in the theatre within the two-year period that we had the right to take it out at the end of the two years, because we were not, as I say, sure whether we could get along. We did exercise our option for the additional ten years.

Q. At the time you made the trade for the Selba Theatre in Central City, Kentucky, was Mr. Pittman running the Empress at that time there?

A. Yes, he was.

Q. What was the Empress Theatre like, as compared with the Selba Theatre,

[fol. 2812] A. Well, the Empress Theatre is a theatre about, has a seating capacity of about three or four hundred seats, is on a side street, it is, in exterior appearance, fairly nice. Its interior won't compare with the interior of the Central City Theatre. It has no rest room facilities, for one thing.

Q. To make it short, did Pittman and Rockwood have any negotiations about the Empress Theatre, if so, who started them and what was the result?

A. Well, we had been in there a week or two and I recall, when Mr. Pittman wrote a letter to Mr. Sudekum, or called Mr. Sudekum and said he would like to sell out and he would like to have a job, that he thought if he could get out of the show business and could get a good job, he would like to get rid of his theatre.

Q. Did he make a proposition to Rockwood after that?

A. Yes sir, he did.

Q. Was the proposition accepted, or what happened?

A. He said he figured his theatre was worth five thousand dollars. We didn't argue with him about it, although I thought it was a very full proposition, and we paid him five thousand dollars.

Q. There has been some testimony introduced by the Government about Mr. Pittman's measuring a garage lot in Greenville, Kentucky. What did you know about that at the time it happened?

[fol. 2813] A. Well, I called the theatre managers every Saturday night and in the course of one of our conversations he told me that a building, a garage building had burned down in Greenville.

Q. First, was Mr. Pittman a resident of Greenville, Kentucky?

A. Yes, he lived in Greenville.

Q. How far is Greenville from Central City?

A. About eight miles.

Q. What did he tell you about Greenville?

A. He told me a garage building had burned down up there and he understood the people who owned the garage were not going to rebuild it and it was a one hundred per cent location and it might be bought cheap and would we be interested in it. I said I appreciated it. He said, I believe you can buy it so that it will be a good investment; it would be a dandy location for a theatre. I said, well, go ahead and look at it if you want to. I said that more to get shut of him than telling him to go over there.

Q. Was the conversation to the effect that he was trying to make you a profit by putting up a theatre in the town of Greenville?

Mr. Wright: We object to that.

(Objection sustained.)

Mr. Waller: I way trying to get along fast.

Q. Did you have any communication from Mrs. Roark, [fol. 2814] who owned the building where Grif Head had a theatre in Greenville, Ky.?

A. Yes, very soon after we went into Central City, I received a wire or letter from Mrs. Roark stating that she had a piece of property available for use as a theatre in Greenville, Kentucky, and asking if we would not come by and see her. And we did not.

Q. Did you hear from her again?

A. Yes, she wrote me another letter, I believe, in two or three months, and sent me a wire, I am not sure which came first the wire or the letter, and said she was going to Florida and she would appreciate it if we would stop by up there.

Q. What happened after that in regard to this building owned by Mrs. Roark?

A. Well, on one of the trips that I made to Central City, going back by way of Greenville, I stopped by to see Mrs. Roark and asked her what she had in mind. At that time she told me that she owned the Palace Theatre building, which was operated by Grif Head. I told Mrs. Roark that we were not interested in acquiring her building unless we could make some sort of deal with Mr. Head.

[fol. 2815] Q. Well, did you talk to Mr. Head?

A. Yes sir. I think we had stopped by to see Mr. Head sometime before that.

Q. Now, go on and state what happened with Mr. Head and Mrs. Roark in as few words as possible so we can get along.

A. Well, from Grif Head's angle, we had stopped and talked with Grif and Grif had suggested a partnership and we weren't interested in a partnership and didn't know if we were interested in Greeneville because we knew that a right smart money was going to have to be spent in Greeneville for a theatre building. So Grif finally said, well, I will sell you my theatre for so much money and I said, Grif, I am not interested in buying your theatre unless we can find out whether we can get a satisfactory lease from Mrs. Roark. So then I would go to Mrs. Roark's about two blocks away and talk with Mrs. Roark and Mrs. Roark would say, Now, are you going to get together with Mr. Head, and I would say, Yes, and back and forth. I spent two days up there running back and forth and we finally closed a deal and we bought the building.

Q. The Government has introduced some evidence of a conversation you had with Mr. Page at Mt. Pleasant, Tennessee in regard to negotiations with Mr. Page for the purchase of his theatre in Mt. Pleasant, Tennessee, and there was testimony about a statement by you to the effect that you could build a theatre and operate it three years at a loss in Mt. Pleasant. Do you recall that conversation?

[fol. 2816] A. Yes.

Q. In which words like that occurred?

A. Yes sir, I made that statement, for this reason; that Mr. Page didn't have much theatre. He didn't own the building at that time, or if he did, he told me his equity in the building was a very nominal sum, I believe he said $1800.00, but I am not positive of that, and he also talked about a partnership, he suggested a partnership, and finally I talked with him one night and he said—I said, what do you want for your holdings? He said, I will take $25,000.00. I said, Mr. Page, are you serious? He said, Yes. I said, What does $25,000.00 include? He says, Well, my theatre and my home. I said; We don't want your home. He said, $25,000.00 is my price. So I said, Mr. Page, for $25,000.00 I can build a theatre across the street and lose money for three years and still save money on it.

Q. Did the Crescent Amusement Company get an option on a lot in Mt. Pleasant, Tennessee?

A. I don't know whether we had a definite, I mean a written option or an oral option. We did have an option on a lot, yes sir.

Q. In connection with those plans did you take up with any distributors the question of finding out whether product was available in Mt. Pleasant?

A. Yes sir. You see, I went through Mt. Pleasant on an average of once every six weeks and I noticed that Mr. Page was not playing anything but Paramount, Columbia and Universal. I never did see any other pictures advertised. [fol. 2817] So that let five of the companies out and I talked with probably three or four of those companies with regard to pictures for Mt. Pleasant and in one case I recall I had a contract with Fox because at the time we thought we were definitely going to build a theatre there.

Q. Why were those plans abandoned?

A. Well, in the first place, the lot that we had was about ninety feet deep and the asking price was around $5000 for

the lot, which was a lot of money for a small town lot a block or two from the square, and we figured it would take $35,000 or $40,000 to build a theatre there and we just didn't have the money at the time.

Q. Did you notice any remodelling done by Mr. Page on his theatre there sometime after that?

A. Well, I went through there, as I say, regularly and I noticed that he put up a marquee sign.

Q. Did you know what he did inside or did you go in?

A. I didn't go in. I understand he enlarged it some.

Q. Now, Mr. Stengel, there has been evidence introduced by the Government with respect to the failure of Rockwood or one or more of the other defendant exhibitor corporations to assume film contracts of a theatre operator where you had purchased his holdings. What was your policy in regard to assuming film contracts which had been made by somebody else?

A. Well, the real reason for that was that I figured if somebody else could make a deal for certain terms and if the deal was a good one, I certainly wanted to try to better [fol. 2818] it. The whole story in the film buys is this, that whatever price you paid the previous year, that is the starting point for the deal for the next year, and the curve of film rental is always up and never down. So if you go into a new town the first time you are going to make a deal in that town you try to bargain as hard as you possibly can to get the best possible film deal, even if you leave out that particular town, as we have done once or twice, leave a town out and not include it in our deal.

Q. Well, in forming corporations such as Cherokee Amusements or acquiring an interest in corporations as Cherokee Amusements and Newport Amusements, did you find out anything about the film deals that this concern had?

A. Yes, I found out particularly when I started buying, but in a case of that kind, why, the same person was usually interested in the theatre and was the managing head of the theatre and the contracts were assumed, or rather they just went on with the business.

Q. That was just the incorporation of a business or the acquisition of an interest in a business?

A. That is right.

Q. Well, in situations like that do you find that all independents had the same kind of contracts with respect to film

rentals, I mean did you find that all the independents had a higher film rental as compared with chains?

A. Oh no. You take some of the Kentucky towns, for example——

[fol. 2819] Mr. Wright: That is just a conclusion.

The Court: Well, he is going to particularize.

A. In some of the Kentucky towns, for example, I believe, Providence, Guthrie and Greeneville, they were buying serials for $3.00, when for towns like Tracy City, Manchester and Rockwood,—the first two towns are just as small as you can get in the way of towns—we were paying $5.00.

Q. Well, what did you find with reference to, say, compare Mr. Baird's deal at Newport, Tennessee with Parrott & Hendren's deal in their towns.

A. There is no set rule for film deals. For example, four companies, Metro, Fox, Warner and RKO may not be all—the deals in the towns may be entirely different. They were in Mr. Baird's case.

Q. Were you able to get better film deals in some of Parrott & Hendren's towns after Cherokee Amusements was formed?

A. Yes sir. It is a question of have to because they were spending more money before we went in than they were taking in.

Q. It was a question of getting better deals or closing up?

A. That is right.

Q. Was the same thing true in Newport, Tennessee where Mr. Baird was an independent?

A. Mr. Baird was a good operator and had made some [fol. 2820] pretty good film contracts, and I believe, for example, in the case of Fox, the first year I bought Fox I paid more money than he did.

Q. Did he have a franchise?

A. Yes sir, he had a franchise. I think that same statement is true with regard to Metro.

Q. You don't mean Metro had a franchise?

A. No, Metro didn't have a franchise but I mean I had to pay as much or more.

Q. Now, Mr. Stengel, have you ever been advised by any distributor, any one of these eight distributors in this case, of the terms of a deal which that distributor was about to

make or had under negotiation with one of your competitors?

A. No sir, I don't remember any deal. I would like to qualify that answer in this way, that whenever you are negotiating for films in competitive towns they might say, Well now, I believe I could get more money from the other fellow, and I tell him to go ahead and sell the other fellow.

Q. Well, have you ever been consulted by a distributor and your approval or consent or wishes asked as to a deal with a competitor?

A. No sir, never.

Q. Has your approval or consent to a deal with any independent operator ever been asked by any distributor?

A. No sir.

Q. Have your wishes or desires in such matter ever been [fol. 2821] asked by any distributor?

A. You are talking about clearance?

Q. I am talking about any deal that a distributor was making with an independent theatre operator, has he ever consulted you or asked your wishes or desires about whether he ought to make it or not?

A. Not before a deal was consummated or approved.

Q. Well, after it is consummated he couldn't ask your wishes or desires, could he?

A. No but I might not like the clearance or something like that but there wasn't anything that I could do about it.

Q. Have you ever individually or as an officer of any of the defendant exhibitors had an agreement or understanding with any one of the distributors or exhibitors or anybody else to keep any competitor or other independent from obtaining films?

A. No sir, I can't say that I have.

Mr. Wright: The same objection.

Overruled.

By Mr. Waller:

Q. You say that you can't say that you did there. Do you mean you have or you haven't?

A. Oh, I haven't, no sir. What I was thinking about, we have always tried to negotiate for the best pictures available and there was just running through my mind that if [fol. 2822] we buy them that doesn't leave them available until the next year for the other fellow.

Q. You mean on the same run?

A. Yes sir, on the same run.

Q. Have you ever bought more pictures than you needed for yourself to prevent an independent or a competitor from using those pictures?

A. We have never bought any pictures with the possible exception of one or two—one of them, Dreaming Lips, in a few situations, where we had paid for the picture and not used it.

Q. Those situations that you talk about such as Dreaming Lips—was that bought for the purpose of keeping somebody else from using it?

A. No; that was bought and not used for the purpose of not showing it to the public.

Q. You mean a picture that you didn't think ought to be shown?

A. It lacked entertainment qualities.

Cross-examination.

By Mr. Mitchell:

Q. Mr. Stengel, I want to ask you about the playing of some pictures at the Knickerbocker Theatre in Nashville, pictures that were available to Buchanan under his Universal Film contract for the year 1938-1939 and under his RKO contract for the year 1937-1938.

[fol. 2823] Q. You have a memorandum of exhibitions at the Knickerbocker?

A. Yes, sir, I have a list of pictures played at the Knickerbocker.

Q. Tell me what Universal products were played at the Knickerbocker—By the way, let me ask you this: What is the rank of the Knickerbocker in Nashville as a motion picture house?

A. We consider it the nicest theater in Nashville; it is one of the top theaters in Nashville.

Q. Well, did the Knickerboeker play the picture "Three Smart Girls Grow Up", with Deanna Durbin and Nan Grey?

A. Yes, sir.

Q. That is a Universal product?

A. Yes, sir.

Mr. Wright: May it please the Court, we don't understand that when Mr. Buchanan mentioned that specifically, you don't contend that any of the pictures referred to were not played by Buchanan?

Mr. Mitchell: Mr. Buchanan testified he closed his house for lack of any product. And I want to show that these pictures were at the Knickerbocker, the best house in Nash-
[fol. 2824] ville, and that he could have obtained them had he wished.

The Court: I recall Mr. Buchanan was asked specifically about some pictures; I don't recall the name of the pictures.

Mr. Mitchell: From our standpoint it is not important that Buchanan played or not, but we want to show that high quality pictures were offered. I would just as soon stipulate that this product was played at the Knickerbocker and it was available to Buchanan; that is all I want to show. Is that pleasing to you?

Mr. Wright: Sure.

Mr. Mitchell: This reads "Three Smart Girls Grow Up, Danna Durbin, Nan Grey. First Love, Deanna Durbin; When Tomorrow Comes, Irene Dunne, Charles Boyer; Son of Frankenstein; Basil Rathbone, Boris Karloff; Can't Cheat an Honest Man, W. C. Fields, Edgar Bergen; East Side of Heaven, Bing Crosby, Joan Blondell, Mischa Auer; Unexpected Father, Baby Sandy, Shirley Ross, Mischa Auer; Sun Never Sets, Douglas Fairbanks, Jr., Basil Rath-
[fol. 2825] bone; Spirit of Culver, Jackie Cooper, Freddie Bartholomew. Stage Door, Katherine Hepburn, Ginger Rogers, Adolph Menjou; Wise Girl——

Mr. Wright: Just a minute; With respect to the RKO pictures you are now referring to, what season's pictures are they?

Mr. Mitchell: 1937-38.

Mr. Wright: Those pictures were rejected at the Rosenbaum theaters, were they not?

A. I wouldn't call it with the word "rejected". They were released by Rosenbaum for the benefit of Buchanan and called RKO.

Mr. Mitchell: (Continuing reading list): Wise Girl, Miriam Hopkins, Ray Milland, Walter Abel, Having Wonderful Time, Ginger Rogers, Douglas Fairbanks, Jr., Joy

of Living, Irene Dunne, Douglas Fairbanks, Jr., Fisherman's Wharf, Bobbie Breen, Irene Dare; Hawaii Calls, Bobby Breen, Ned Sparks.

The Court: All right; adjourn until 1:30 P. M.

(Noon Recess.)

[fol. 2826] Afternoon Session

Cross-examination.

By Mr. Wright:

For the Plaintiff:

Q. Mr. Stengel, I understood you to say on your direct-examination that you didn't discuss with the representatives of the distributors what they might or might not do in connection with licensing their films to your competitors; is that right?

A. That is the statement I made, yes, sir, Mr. Wright; and I cannot remember at the present time of any specific case where they have.

Q. Well, there is one very important qualification to that statement in any event, and that is with respect to the question how pictures you may play may be made available to competing theatres; is that correct?

A. It may be correct from the standpoint of merchandising film, but it has never had anything to do with our buying film.

Q. Well, has you- buying film got anything to do with your merchandising of the film; what do you mean by merchandising film as distinguished from buying film?

A. When we buy film in small towns we want two runs——

Q. Want two what?

A. Want two runs; the problem of zones of clearance [fol. 2827] between runs doesn't come up.

Q. Well, what were those clearances and negotiations that were turned over to you in connection with these franchise agreements, about, up there, if you didn't have to do with clearance and rent?

A. They had to do with clearance in towns other than in the same town?

Q. Well, in any event, whether it is in a different town or in the same town, you do have a distinct interest, do you

not, with what will be done with pictures that play in your houses after you get through playing them, isn't that right?

A. Well that interest has never gone so far that we have taken it up with the film company in the negotiation for film.

Q. Haven't discussed that with them, is that right?

A. As for one town and one town alone and the number of runs in that town——

Q. I didn't ask you that. Just listen to the question and answer the question. Now, it is a fact, is it not, that in negotiating with the film companies you do discuss the terms upon which the pictures that are used by you may be made available in competitive situations, or theaters competing with your theaters?

[fol. 2828] A. No, we don't discuss the terms. We discuss the clearance.

Q. Well, clearance as you understand it is an item that is usually incorporated in a licensing contract, isn't that right?

A. Yes, it is a part of the contract.

Q. And whenever you discuss a clearance with a distributor, you are in that sense discussing the terms on which the films that you play will be made available to theaters which compete with you, isn't that correct?

A. As to the clearance yes; not as to your definition of the word "terms".

Q. And the reason that you do that is because what happens to the film that you buy with reference to when it plays in theaters that are in opposition to your theaters, does affect your business and the value of the film to you, isn't that correct?

A. Certainly, you want clearance to make more money and to protect your own revenue.

Q. Yes, and the further back you can hold the competing theater and the films that you play, the more money you can make, is that right?

A. Well, there is a reasonable clearance; in other words, that depends upon the particular clearance clause in their [fol. 2829] contract.

Q. That is right; but as a general proposition, when you negotiate these deals you attempt to get just as much clearance as you can, isn't that right?

A. Up to 60 days, and, possibly, in one or two cases, 90 days, and that is the maximum.

Q. Well, after 60 or 90 says, it doesn't make much difference to you, does it?

A. It doesn't make any difference; but that is the most we ever ask for.

[fol. 2830] Q. Well I assume that you thought that you could make your exhibitions of the films more profitable by getting a hundred and twenty or a hundred and eighty days, you would do it, would you not, you would not hesitate to ask for that, would you?

Mr. Waller: Objected to, it is argumentative.

The Court: Sustained.

Mr. Wright: His whole testimony has been argumentative on his whole direct here, as to what he does with his film deals.

The Court: Sustain the objection.

Mr. Wright:

Q. Now in connection with this current Fox franchise, as the deal was originally set up in the memorandum that was introduced in evidence here, you had the privilege of a repeat run in any and all of the Crescent, Rockwood situations, that is correct, isn't it?

A. Mr. Wright I believe I said that there was not a second run sold, that is what I said, there were no second runs sold.

[fol. 2831] Q. That is what I said, there are no second run sold, but you had the privilege which was given of a repeat run?

A. No, I said we had a repeat run in any situation where a specific second run was not sold on specific franchise business.

Q. I am not talking about the franchise which was finally incorporated in the later documents, I am talking about the deal as it was originally made with the Crescent, as evidenced by the memorandum here, I believe Government's exhibit number 286, that deal you originally negotiated did not provide for any second runs at that time, did it?

A. No, sir, those were all first run contract that were listed on that sheet, and all were put in there and the repeat run, that was to apply to all situations.

Q. That is what I am asking you, I mean the wording of that clause did not specifically exempt any towns?

A. That did not specifically exempt any towns where we already had second run contracts?

Q. It could not very well exempt second run if you hadn't bought a second run contract?

Mr. Waller: We object to that, it is argumentative.

The Court: Overruled.

[fol. 2832] Mr. Wright: Have you the exhibit here, Mr. Clerk. Let us see what the exhibit says.

The Court: It is here somewhere.

Mr. Wright:

Q. Well in any event, regardless of what is is in the exhibit, you did not negotiate any second runs for Crescent or Rockwood towns until the fall of 1939, isn't that right?

A. No, sir, we would go into negotiations but did not acquire any second run, the second run negotiations at that time were not completed at that time inasmuch as they wanted larger commitments than we felt we could use in those particular towns. I believe they asked us for something like thirty pictures second run in the various towns, and we couldn't get together as to the number of pictures to be used.

Q. Well in any event, the deal sheets under the Crescent franchise in which the second run terms are incorporated are dated December 14, 1939; does that or does that not represent the date on which you made the agreement with respect to the second run that are incorporated in the franchise?

A. Well as I previously stated, Mr. Wright, I could not be sure that the second run contracts were negotiated at that time, or at a later date.

[fol. 2833] Q. Please answer the question?

A. It would indicate it to me, yes, sir.

Q. Now I will ask you to look at this memorandum agreement, marked as Government's Exhibit Number 226, and ask you to show me where there is anything there about exempting second run situations? (Passed to the witness.)

A. It says nothing about it in here.

Q. Well, is it your testimony now that you had some understanding about it that was not in there?

A. There wasn't any understanding, no, sir.

Q. Well it is a fact, is it not that you did not negotiate the second runs that are now incorporated in the Crescent franchise until you found out you could not have a repeat run clause in those towns?

A. Yes, sir, immediately; just as much as it is a fact that those clauses did not appear until we agreed to them.

Q. Now I will hand you this letter of November 9, 1938, photostat letter, from you to Mr. Wilson, and ask you if you wrote that letter, on that date?

A. Yes, sir, I wrote it.

Q. I will ask to have it marked as next Government's exhibit.

[fol. 2834] The Clerk: Government's exhibit 361. (Marked.)

Mr. Wright: I would like to read this, I am offering it in evidence, and I would like to read it, if the Court please.

This is a letter dated November 9, 1939, from Mr. Stengel to Mr. Wilson, marked Government's Exhibit No. 361.

> "With further regard to our phone conversation relative to the clearance clause and the repeat run clause in the franchise, I wish to advise that I discussed this matter in detail with our attorneys.
>
> "They, in turn, discussed same among themselves and have written us letters, copies of which are enclosed herewith, as to their opinions in the matter.
>
> "Best wishes and kindest personal regards."

Q. Now what was this telephone conversation that is referred to in this letter, is this the one in which you say that you said that it was agreed to we have the repeat run clause where opposition might come in?

A. No, that was not this conversation in which Mr. Wilson himself said first run agreements any other clearance in any town, where that town did not have a clearance provision in the original franchise and with respect to repeat [fol. 2835] runs, he said we did not want to give you the repeat run privilege?

A. And he said we have had quite a bit of trouble about it, or words to that effect, you want me to tell you what I said?

A. Yes?

A. I told him with regard to the clearance clause there were only a few towns in the original franchise that some of the clearance that we are asking for was over theatres

that were not in existence, when the original franchise was drawn, and the original clearance terms agreed to, and with respect to the balance of the towns, which are not in the original franchise that I was against tying ourselves up for three years, and we wanted certain assurance on a flat rental contract of those films, that they would not be dated in those particular towns ahead of us. With regard to the repeat clause I told him that at least seventy-five or eighty per cent, I will put it this way, that fifty per cent of the Crescent Amusement Company towns were one theatre towns, about eighty-five per cent of the Rockwood Amusement, et al., towns were one theatre towns, and our purpose of wanting the repeat run clause was the privilege of playing for a second time in the town a big picture *m* run some picture that had been attracting patronage at the box office.

[fol. 2836] Q. Did you say anything to him in this conversation about being willing to waive the repeat run privilege in a situation where competition might appear?

A. I believe that came out later, Mr. Wright.

Q. When did that come out?

A. I think this came out about within, I suppose, the dates, six weeks to about two months. It may have been longer, it took a long time. We were arguing that repeat run clause, I was asking most of the time, but in accordance with one of his conversations, that one of these letters he wrote said your would have the privilege, if any opposition came in a town, and we would have the right to second run, that there is also a repeat clause, but that would detract from the second run clause, contract, in the town, and we did not want to take that risk, and he said all right, it doesn't matter to us if you want it.

Q. If the clause was not there if there were competition, that clause does not function, is that right, it is all right?

A. Yes, sir.

Q. That is what I wanted *go* get, and when you finally decided that matter?

A. You mean the exact date?

Q. Yes?

[fol. 2837] Mr. Waller: I object to that form of question.

Mr. Wright:

Q. When did he undergo that, when did he make the decision, and Fox then put it that way?

A. Mr. Wright, let me clarify one thing, may be this will help. Mr. Wilson in Atlanta, with these deal sheets, which we were getting up that we were hoping to get, he said that Mr. Ballance will not go for the repeat clause, and I will not go for the clearance.

Q. That was some time before this letter of *O*ctember ninth was written?

A. I am talking about this little memorandum of ours was say from that time on we were asking for a repeat run, I wanted a repeat run, bec-use of the money I thought we could make out of it.

Q. I would still like to know when it was that you told Mr. Wilson that Mr. Ballance, Mr. Wilson or Mr. Ballance that you were agreeable to the insertion of the clause that now appears in the franchise, which waives the repeat run privilege in the event opposition appears?

A. When was the date on the letter, please, sir, in which it was made?

Q. This letter is dated November 9, 1939.

A. Well it must have been on or about that time.

[fol. 2838] Mr Waller: I think that is with regard to some other matter, that is before the letter that he has, I do not think the witness understood.

Mr. Wright:

Q. Well this letter refers to two copies of an opinion of your attorneys, are those opinions the ones that contain this suggested language that is in the franchise, about wa-ving the clause if opposition appears?

A. Yes, sir. I went to Mr. Armistead and explained the situation to him just as I have explained it to you, and I said if the opposition is not there, if competition is not coming into the town, we do not care about it, we want the privilege of repeating pictures.

Q. Yes, now the copies, if I understand you correctly, the copies of the opinion which were inclosed in this letter of November 9th, were the ones which pointed out this particular phraseology that is now in the franchise?

A. Yes, sir, I explained that to Mr. Armistead and that is the way we put the repeat run clause in the contract.

Q. You are sure that is included in this letter that went with the opinions, you are sure that t-e letter in which they were enclosed was not the letter of November 9, 1939.

[fol. 2839] A. What was that, Mr. Wright?

A. I say you are sure that the opinions you have just referred to which pointed out this particular phraseology that is in the franchise as a means of solving the competition problem, were the opinions which were enclosed with this letter of November ninth?

A. I would be sure for this reason, there are the only two opinions that I ever got from Mr. Armistead about a film contract, so I am sure they must be the ones.

Q. You haven't got copies of those have you?

A. I do not know whether I have or not, Mr. Wright.

[fol. 2840] Q. I notice, in reading second run deals, that you made for the Booker of Crescent towns, they say: "A minimum commitment of 26 pictures each year." That meant that in selecting those pictures that you were to play second run, you were to take 26 out of the entire year's product?

A. Had to use a minimum of 26.

Q. Those were to be selected as and when the particular films were released?

A. Yes sir. I think there is a general clause in every film contract that said the pictures must be selected within a certain time after release date. Isn't there a playing arrangement on that deal sheet?

Q. I don't see any.

A. I don't know. There isn't on the deal sheet, but I believe that somewhere in the contents of the franchise itself there is something about playing the pictures one-fourth of the pictures each quarter, I think is the way it read, or words to that effect.

Q. But in any event, you were not compelled to select the 26th picture until after you had seen the last picture released during the season, that is correct, isn't it?

A. That might be true in theory, but it certainly was not true in practice.

Q. Well, in practice, you were not compelled to select the [fol. 2841] *the* pictures under commitment for a number of your theatres until late in the Spring of 1940, isn't that right?

A. I didn't understand the first part of your question?

Q. I say, as it worked out, you didn't begin to actually play off the commitment for the 1938-1939 pictures there until the Spring, or for the 1939-1940 pictures, until the Spring of 1940, isn't that right?

A. Well, the contracts weren't negotiated until December, were they?

Q. That is right.

A. You see, in booking, particularly, a second run house, or a house that follows release date by some sixty or ninety days, you book three and four months in advance. For example, in the Rockwood house, I am pretty well booked right now through—Let me see. This is August; September, October and well into November. And that is the way that you book for a second run house.

Q. Well, now, take Morristown, second run pictures that were to be played in the Ritz or Princess, as a matter of fact at that time you were only operating the second run house there about one or two days a week, isn't that right?

A. I couldn't be positive how long we were operating it, how many days a week.

Q. Where you continued to operate them one or two days a week, you didn't use all of them there, did you?

[fol. 2842] A. I don't know whether we did or not.

Q. Don't you recall discussing with Mr. Wilson, or any other representative of Fox or with the Fox booker, the bookers complained that the 1939-1940 product had been tied up second run, on those deals but that actually they were receiving very little second run revenue out of them because a number of theatres that you had covered here were either operated one or two days a week or were closed.

A. I believe that there is a clause in the franchise that protects us to this extent? We made a franchise over a period of years and you can't see in the future, you don't know what is going to happen and there is one in regard to one-theatre towns, that in the event it is necessary to close the theatre, then that the contract commitments shall be reduced in proportion to the playing time that has been cut down, and I think that that clause is also true with respect to the second run deal. Because we can't tell how conditions might be. For example, you have got an Army Camp over here at Manchester and Tullahoma, there it is necessary to run two theatres full time. But as soon as that goes out, may be two theatres can't get along.

Q. Now, you can answer the question.

A. I thought I was answering it, I am sorry that I did not. What is the question?

(Question read by the Reporter.)

[fol. 2843] A. If there were any communications or complaints of that nature, they were directed to Miss Brockett, who handles the booking. I don't know that there were any.

Q. Well, in any event, under a deal of this kind, whether you actually used the full amount of the pictures of 26, or any other number, the distributor is definitely effectually prevented from selling the same pictures second run to somebody else, isn't that right?

A. If we have a second run contract, I mean, if we have a second run contract, certainly he cannot sell second run to anyone else.

Q. Even though your commitment may be for only one-half of the pictures he may have released?

A. I don't think you would find many contracts that would carry more than a fifty per cent commitment second run in any town as small as ours.

Q. You say these questions of booking are taken up with Miss Brockett. Is she Crescent Booker.

A. That is correct.

Q. She doesn't make the decision as to whether or not to close a house, or how many days a week to operate it, does she?

A. She certainly does not.

Q. That is made by you and Mr. Sudekum?

A. That is correct; Mr. Sudekum for the Crescent towns [fol. 2844] and I for Rockwood.

Q. From your standpoint, what you try to do is to achieve the greatest degree of flexibility you can, in your operations, isn't it, with respect to the amount of product you have committed?

A. Yes, flexibility is always desirable.

Q. You want to be in a position to operate one house or two houses in the town?

A. You wouldn't buy a second run contract unless you had a place to use it, Mr. Wright.

Q. Now, in connection with the Warner clearance; I understand that you carried on clearance negotiations for both the Rockwood and the Crescent towns with Mr. McCoy?

A. I did.

Q. By the way, when the term "Rockwood towns" has been used, that includes the towns with theatres operated

A. The other defendant corporations: Rockwood, Cherokee and Kentucky Amusements.

Q. It includes more than that, doesn't it? Also includes Ruffin and Cherokee?

A. Yes sir, it includes—Do you want all of them?

Q. Yes.

A. It includes Hartsville Theatre Corporation, it includes Lawrenceburg Theatres, it includes Chickasaw Amusement [fol. 2845] Company, it includes Ruffin Amusement Company, and Newport Amusement Company.

Q. In addition to Kentucky and Cherokee, that are defendants?

A. Yes, Kentucky, Cherokee and Rockwood. That is about all of them, I believe.

Q. I will show you a letter dated December 15, 1939, from Mr. W. C. Hames, Office Manager for Warner, to you, and ask you if you received that letter shortly after that date?

A. Yes sir, I received it.

Mr. Wright: I will ask to have that marked with the next Government Exhibit number, and offer it in evidence.

The Clerk: Government's General Exhibit No. 362.

Mr. Wright:

Q. Did I understand you to say, in discussing these clearance situations with Warner, there was no discussion of the competing theatres that were affected?

A. I didn't say that, no sir.

[fol. 2846] Mr. Waller: May I see that letter that has been offered in evidence? I haven't seen it. (Letter handed to counsel.)

By Mr. Wright:

Q. Your testimony is that in connection with, at least with discussing Warner clearances you did discuss competing theatres, which would be affected by that, isn't that right?

A. I don't know as I understand your question but I will tell you the way it happened. We first agreed on the dollars and cents for the pictures or the percentage terms. Then Mr. Kalmanson left town and I worked out the clearances with Mr. McCoy and Mr. Williamson was not here and I gave him a list of the clearances that we wanted and he said

Q. Yes, I understand that. I am trying to find out now whether there was or there was not at the time you discussed the situations where you wanted clearance with Warner any discussion of the theatres that were operated by competitors and yours that would be affected by the clearances.

A. Well, naturally in any clearance negotiations, why, you always argue as to why you want it and any distributing company is always reluctant to give clearance of any kind, so you have to have a number of reasons, bring out a number of reasons why you want any clearance and why you are justified in it. It is again a question of selling the film companies on the idea, and you, just like anything else, sometimes ask for more than you really want or expect to get.

[fol. 2847] Q. And in that kind of discussion you discussed these competitive situations which are affected by the clearance, both yours and those of any independent that might happen to be in opposition to yours, don't you?

A. Discuss them in what way, Mr. Wright?

Q. In arguing and pres-nting your case for the granting of clearance in favor of your houses.

A. Oh, I will make this statement—I think our theatre a better theatre. Like the man over here when I was arguing Huntingdon and McKenzie, for example—I brought out the particular point that McKenzie was being run as a part-time operation by Mr. Moore and we were hiring a manager who was working full time in Huntingdon; also, Huntingdon was the county seat; that it was a better theatre physically than Mr. Moore's theatre was; that the potential possibilities looked better and so-forth and so on.

Q. Now, that is the kind of discussion that is typical of any discussion you have with respect to clearance?

A. Yes sir, certainly, surely.

Mr. Wright: I will offer this letter of December 15, 1939, marked Government's Exhibit No. 362 in evidence.

The Court: Suppose you read it.

Mr. Wright: The letter is as follows:

[fol. 2848] "Dear K. C.:

situations, we are enclosing herewith a schedule that we have worked out. This covers your theatres, as well as Crescent Amusement Co.

We cannot grant clearance that you requested as listed below:

Rockwood, Tenn., 14 days over Spring City.
Columbia, Tenn., 14 days over Mt. Pleasant.
Gadsden, Ala., 21 days over Attalla, Albertville, Guntersville, Center, Piedmont, Jacksonville, Boaz and Coleyville, Ala.
Alabama City, Ala., 14 days over Attalla.

It so happens on all of the above we had already made contracts on our new product, which makes it impossible for us to extend clearance as you have requested.

Won't you please be kind enough to check over the attached schedule very carefully, and if there is anything that is not satisfactory, you can discuss this with Mr. McCoy as he will be in Nashville sometime the early part of next week.

Wishing you and yours a Merry Christmas and a Happy New Year, I am

Very truly yours, W. C. Hames, Office Manager."

[fol. 2849] Q. Now, when was it that you finally agreed upon the clearance which is incorporated in the Warner franchise?

A. What is the date of the letter you just put in evidence?

Q. December 15th.

A. I would imagine sometime in the spring of the following year or rather the early part of the following year. I couldn't be positive as to the exact date.

Q. Now, with respect to this clearance between Huntingdon and McKenzie, I believe you testified that after you took over the operation of both theatres and played Huntingdon prior to McKenzie the receipts from Huntingdon were greater than they were from McKenzie. Is that right?

A. I didn't make that statement, Mr. Wright.

Q. What was the statement that you made?

A. I made the statement—you asked me about McKenzie and Huntingdon?

Q. Yes. I didn't ask you——

A. Now, from the time we acquired McKenzie, from that time until we opened the new theatre in McKenzie the average monthly gross receipts were more in Huntingdon than they were in McKenzie, although—and I didn't put this clause in my statement before—pictures were played in some cases ahead of Huntingdon and in some cases behind Huntingdon.

Q. Now, let's take the specific case of Paramount. It is a fact, is it not, after you took over the theatre at McKenzie you had clearance written in favor of—or before you took [fol. 2850] over the theatre rather, you had clearance written in favor of Huntingdon as against McKenzie, isn't that right?

A. Yes.

Q. Do you recall that?

A. That is right.

Q. You say now after you took over the theatre at McKenzie then instead of continuing clearance, you began playing the theatre day and date?

A. No, I didn't say that.

Q. Well, did you continue, after you took over both houses, to play the theatre at McKenzie after Huntingdon?

A. Are you speaking of some particular product?

Q. Paramount, yes.

A. I couldn't answer that question without looking at the books but I would be willing to speculate that in many cases we played some Paramount pictures in McKenzie ahead of Huntingdon, asking for that permission from the Memphis office. We were losing money in McKenzie and trying to get the theatre up on a paying basis.

Q. One of the things that might cause you to lose money at McKenzie would be playing pictures there behind Huntingdon, isn't that right?

A. Well, I can best answer that question by telling you of a case where we did play pictures in McKenzie ahead of Huntingdon and it didn't help our gross on the week. Our manipulations with respect to bookings didn't help Mc- [fol. 2851] Kenzie's gross until we opened the new theatre.

Q. You have very complete records, haven't you, Mr. Stengel, which would show precisely what any particular pictures did or didn't gross in McKenzie and what they did or didn't gross in Huntingdon and the relative dates on which they played the two theatres, isn't that right?

A. Yes sir.

Q. And those records would be better than any memory that you can give us now on the stand as to what actually happened?

A. Mr. Wright, I didn't make any statement—I would like to explain this. I didn't make any statement with respect to any given picture. I was speaking of the accumulative week's gross.

Q. Now, when was it you acquired this 75 foot lot in McKenzie?

A. 75 foot lot?

Q. Yes sir. I believe you testified you bought a lot there that was seventy five feet deep?

A. No, sir.

Q. Or you had an option on a lot?

A. No.

Q. What was it you did say?

A. We rented a building, now, which was approximately twenty five feet wide and something like seventy five or eighty five feet deep. The rental price was about $25.00 or $35.00 a month, right on the Square.

[fol. 2852] Q. That building was leased by you and that was just a few days, you say, or weeks, before Mr. Moore came in to see you about a sale?

A. It is my recollection Mr. Moore came in right after that. How he found out that we had leased the store I don't know.

Q. You knew at the time you leased the store that the store wasn't suitable for the erection of a theatre that would be superior to that of Mr. Moore, didn't you?

A. You mean that one building?

Q. Yes.

A. I think that a theatre could have been erected there that would have been far superior to Mr. Moore's in that particular location. The trouble was, as far as we were concerned, spending that much money to erect a theatre and then only end up with approximately three hundred seats, we weren't accomplishing anything.

By the Court:

Q. I understand you say that in getting in a theatre

ing a hundred and ten feet in depth and preferably a hundred and twenty feet, is that right?

A. Yes sir, that is correct. You see, in a lot of these small towns an alley runs behind and they usually have about eighty foot lots, and it is quite hard to find a lot [fol. 2853] of that depth—I mean there may be only one or two pieces of property available in the town in a good location and, of course, it is kinder hard to trade for it. I understood Mr. Wright's question in this particular case was, could you have bought this particular store building and build a theatre that would have been nicer than Mr. Moore's, and my answer to that is, yes, and I know that we could have.

Q. Do you know the depth of Mr. Moore's lot?

A. I would guess about ninety to a hundred feet. However, it is located on acreage there and could be extended as far as you would want to extend it.

By Mr. Wright:

Q. Well, in any event, when you took over Mr. Moore's theatre you continued to operate it without any new equipment or any remodelling whatsoever, is that right?

A. That is correct, but may I explain this?

[fol. 2854] The Court: Go ahead and make your explanation.

A. There is a clause in his lease with the Masons that within a certain length of time that he occupied the premises he was supposed to put in some rest rooms; and the Masons tried to get us to do it, and I told him we were going to build a new theater.

Q. But you continued to operate it for over two years before you opened any new theater, that is right; is'nt it?

A. I believe that is about right as to the time; I could not be sure without checking it.

Q. Well, according to this tabulation of some equipment and remodeling, there was nothing whatsoever spent on the theater?

A. I think the work started in January of this year.

Q. I am talking about the theater Moore operated.

A. No; we didn't spend any money on it.

Q. And you didn't acquire his land for the new theater, did you, until March 1940, at least March 21, 1940, is the

date you have on defendant Exhibit No. 147 opposite a figure of original cost of the land and building of $7500.00?

A. Isn't that the figure that was in the interrogatory and date?

[fol. 2855] Q. I am taking the figure now off your Exhibit No. 147.

A. I don't know; that must have been the date the deal was closed, I presume.

Q. As I understand it, you decided to go into McKenzie because you didn't believe that Moore had been giving the public there the service to which you thought they were entitled, is that correct?

A. Well, that may be one way of phrasing it; but I don't think that was the complete reason. We thought we could make money out of a good theater operation in McKenzie.

Q. When you say "We" who are you referring to?

A. Rockwood Amusement Company.

Q. Did you discuss the matter with Mr. Sudekum?

A. Which particular matter?

Q. Going into McKenzie?

A. I am sure that I did, because I discussed most everything with him.

Q. Did I understand you, Mr. Stengel, to say, that you never concerned yourself with the terms by which a distributor would serve a competitor of yours with his pictures except with respect to clearance?

A. Well, I don't know exactly what you mean. I would do every sort of thing that I knew how to do that was legitimate to buy film in negotiations; and if I ever heard [fol. 2856] that somebody was paying $7.50 for a picture, I would certainly try to get it for $6.00.

Q. I am referring now to any suggestions you might make to a distributor as to the terms on which he would serve his pictures to a competitor of yours?

A. To the best of my recollection, Mr. Wright, I have not.

Q. I will show you this letter, dated August 15, 1938, from you to Mr. Barnard of Paramount Pictures, and ask you if you wrote that letter on that date?

A. Yes, sir, I did. Would you like to know the reason why?

Q. I will ask to have it marked as the next Government Exhibit.

The Clerk: Government Exhibit No. 363.

Mr. Wright:

Q. While we are waiting you might just tell us why you wrote it?

Mr. Waller: I would like to see the letter, your Honor, before the question is answered.

The Court: All right.

Mr. Wright:

[fol. 2857] Q. Go ahead and answer it.

A. That letter has to do with a ten cent admission price that is being charged by Mr. Dozier on Paramount pictures in Earlington, Kentucky, and we were playing pictures in Madisonville, Kentucky, which is a town about three miles away at an admission price of 25 to 35 cents. One of the reasons for that matter was this: that Mr. Dozier was running a trailer on his screen, which said, in substance, wait and see Paramount pictures at this theater for ten cents. Now, I wrote the letter with the hope that there was a clause in Mr. Dozier's contract as to minimum admission prices and hoping he was violating that clause so he would have to raise his price. But that wasn't during the time of negotiations for any film contracts.

Mr. Wright: I have had the letter marked, and I will read it.

The Court: All right, read it.

Mr. Wright: I will read it (Reading):

"DEAR MR. BARNARD:

I have just received some information which I would like to pass on to you. Mr. Dozier, of the Roxy Theatre, Earlington, Ky. has stated to some people that he is [fol. 2858] going to buy Paramount pictures this season, playing them after Madisonville at 10¢ admission prices. As you know, we played your pictures in Madisonville this year behind Earlington and charged full admission prices. I am giving you this information as it came to me, as I am sure you feel as we do with regard to playing Paramount pictures at 10¢ prices."

Q. Mr. Stengel, I believe you testified that you negotiated the United Artists deal that is in evidence here that was dated April 8, 1939 and covered the 73 Crescent and Rockwood situations?

Mr. Raftery: That is the wrong date. April 8, 1939 is the 61 situations deal; 73 is the next year.

Mr. Wright:

Q. All right. Did you negotiate the 61 situation which was dated April 8, 1939 and which is in evidence here?

A. Which was dated when—April 8, 1939?

Q. Yes?

A. I worked with Mr. Sudekum in making that particular deal, yes, sir.

Q. And do you recall who represented the United Artists?

A. Bob Mocrief and Dave Prince, I believe.

[fol. 2859] Q. Now, I will hand you a letter dated April 14, 1939, from you to Mr. Prince, and ask you if you wrote that letter on that date.

A. Yes, sir, I wrote the letter.

Q. I will ask to have that marked with the next Government Exhibit number.

The Clerk: No. 364.

Mr. Wright:

Q. The contracts that are referred to in the letter are the contracts dated April 8th, which cover the exhibition of United Artists' 1938-39 product in sixty odd Crescent and Rockwood situations, is that right?

A. I think so, but I couldn't be positive without seeing the contract. I am sure, reasonably sure, that that is what I refer to there.

[fol. 2860] Q. I think on your direct examination, Mr. Stengel, you testified that the Rockwood Company or its subsidiaries, built theatres in a substantial number of towns where there had been, had never been a theatre before; can you name those towns for me?

A. Yes, sir, I can. May I refer to this tabulation?

Q. Sure? (Refers to memorandum.)

A. The following towns to the best of my knowledge did not have a theatre that had been operated since talking pictures came in, or at least they were not operating any theatre when we went in the town. Manchester, Tennessee, Tracy City, Tennessee, Cowan, Tennessee, Carthage, Tennessee—there was a person came in there and he set up a tent and ran for a night, he ran it on a circuit, but there

was no legitimate theatre being run there full time. Thompkinsville, Kentucky was closed at the time we went in there, or it had closed, because it was sold at the courthouse door, that is how we acquired it.

Q. The theatre was there?

A. Oh yes.

Q. You acquired an existing theatre?

A. Oh yes.

Q. Where I asked you was situations where you built theatres where there had been none before?

[fol. 2861] A. There was not except that one, that is the reason I stopped to explain it.

Q. Is that true as to Tracy City too?

A. Yes, sir, there was a building there that was not being used, it had not been for ten years.

Q. It was a theatre building?

A. Yes, it was a theatre building.

Q. The question I asked you was to name those towns where no theatre had existed before, and where you constructed a new theatre?

A. Burnsville, North Carolina. Continuing; Pruden, Kentucky, Greenfield, Tennessee, Halls, Tennessee, that is about all of them.

Q. Are there any in that list now like Tracy City, where you took over an existing theatre building?

A. Let me check it again, Mr. Wright, if I may. Manchester, Tennessee, Dr. Womack built a building for us and we leased it. Cowan, Tennessee, there was not a theatre building—come to think of it, I believe they set up vaudeville equipment on a flat floor, it was closed when we took it over and remodeled the building, in fact we gutted the building that was there. The same was true with reference to Greenfield, that might be termed a theatre building, but we gutted the theatre building. Burnsville, we built all of [fol. 2862] it. Pruden, Kentucky, we did not build a theatre, we leased a building and the same is true of Greenfield, Tennessee, we built the building.

Q. I hand you this Government's exhibit No. 364, a letter from Mr. Stengel to Mr. Prince, the letter says:

> "Dear Dave: We are in receipt of your letter of April 10th wherein you advise that your producers have approved the various contracts dated April 8, 1939, for our various operating companies.

"In checking the contracts we find that one of the suburban runs was inadvertently omitted, and that Mountain City, Tennessee, was inadvertently included in the contracts. As per our verbal agreement over the phone today, we are leaving the suburban runs as written and are substituting the Palace Theatre, Greenfield, Tennessee, in lieu of the Strand Theatre, Mountain City, Tennessee. In other words, this will leave exactly the same number of runs and in substance amounts to our substituting Greenfield, Tennessee, for one of the Nashville suburban runs.

"I have discussed the sicty day clearance clause with regard to the Nashville runs with Mr. Sudekum. I have explained to him why this figure instead of a thirty [fol. 2863] day clearance was put in the contracts, i. e., because of the terms of the last contract. Mr. Sudekum stated that in view of the fact that most of the pictures included in the deal had already been released, it would be quite alright to leave the sixty day clause as written. In the future, however, whenever we make any other contracts, he wants it distinctly understood that a thirty day clause for the Nashville runs is to be effective.

"We are returning herewith properly executed the contracts dated April 8th and previously referred to."

There is another paragraph that refers to something else.

The Court: I did not think the Nashville situation was included in this lawsuit?

Mr. Wright: This is the contract that is offered primarily for the reference to the contracts of April 8th, 1939, when they were finally executed by the exhibitor company.

The Court: All right, introduce it for that purpose.

[fol. 2864] Mr. Waller: If it is for that purpose, if that is the purpose for which it is offered, we object to it because the contracts are the best evidence, and they are here.

The Court: Is there any question about that, any difference?

Mr. Wright: The contracts are dated April 8th, and that is the way they appear in our tabulation, actually this shows they were not approved and signed or executed by the United Artists Company or by the exhibitors until April fourteenth.

The Court: What difference does that make?

Mr. Wright: We think it is significant in connection with the deal that was made with the United Artists, Muscle Shoals and Athens, Alabama, that actually this deal was hooked onto this deal here and that is why it sent to April.

The Court: What is the date of the Muscle Shoals contract?

Mr. Wright: April twelfth, when he said he went in nego- [fol. 2865] tiations.

The Court: All right.

Mr. Wright:

Q. Now in connection with this tabulation you offered which is entitled, Equipment and Building Additions as per years closing on June 30 of each year, 1935 to 1941. That tablulation is not confined, is it, strictly to additions, doesn't it also include original building and equipment cost?

A. That exhibit, the way it is prepared, Mr. Wright, shows merely this, the amount of money that we spent on remodeling the building, or any new equipment during that five year period omitting any investment that might have been made prior to the time that the exhibits first start, which I think was June thirtieth.

Q. In addition to remodeling some of these items, opposite the word building, represent new building?

A. Certainly, that is correct.

Q. You did not make any distinction here between remodeling old buildings and building new ones, is that right?

A. No, sir, just to show you there that there has been a continuous flow of money going out toward bettering the theatres we did have; and also for us to acquire new ones, [fol. 2866] if they are on there.

Q. And also these items with respect to equipment include such purchases of equipment as you might have made from an operator at the time you acquired a lease on his theatre, isn't that right?

A. I am sure that would be correct.

Q. The sixty-five hundred dollars that is on here opposite the word equipment for the Doradele theatre, is that with regard to what you paid to the operator for his equipment et al., when you bought him out?

A. That is correct.

Q. And it does not refer in any way at all as to the character and condition of the equipment?

A. There is an estimate made to show the character and condition of the equipment in the exhibit.

Q. Are there any of those figures?

A. Naturally I would like to point out if we had the theatre prior to the first year on there, it doesn't show any money that was spent on original acquisition, or original cost.

Q. Throws no light whatsoever on the physical condition of the theatre or equipment, does it?

A. For example, you can take Bowling Green there, and you can look to see how much money we spent in Bowling [fols. 2867-2869] Green to remodel the theatre, which we already had there.

Q. May be you can, but I can't tell from looking at this exhibit whether any money was spent at Bowling Green, or what it was spent for, the only items that you have on here is an item of building and another item of equipment?

A. That is correct.

Q. As I understand it, you did not attempt to make any segregation between remodeling or new construction?

A. No, sir.

. . . . . .

[fol. 2870] (After Recess.)

Mr. Wright: I wish to substitute a letter or photostatic copy of letter dated August 15, 1938, from Mr. Stengel to Mr. Barnard, the original of which we just marked in evidence, in lieu of original.

The Court: What is the number of the exhibit you are substituting it for?

Mr. Wright: Have you got the number of the original letter there. I think it was the only original letter that you had.

Q. Mr. Stengel, this morning, or on direct examination, you testified in respect to popcorn sales. I will ask you if all those popcorn sales that you were talking about are made in machines, that you keep in the lobbies of the theatres that you operate?

A. Yes, sir.

Q. They are all made, as I understand, and conducted as a part of your theatre business, isn't that right?

A. There is one exception, that is, in Manchester, Tennessee, there is a man that has a store just adjacent to the

theatre lobby and we have a partnership with him in the popcorn machine; he pays us fifty per cent of the net profit.

Q. Otherwise, it is run—You sell popcorn to people who are patrons of the theatre?

[fol. 2871] A. No sir, we try to capitalize our popcorn machines and get them on the street. The psychology and theory of selling popcorn is to put them in the way of people where they have to walk around it.

Q. But customarily, you put your popcorn machines out on the sidewalk or in the lobby?

A. On Saturdays, when the weather will permit, we put it out on the sidewalk.

Q. With permission of the city or town officials? You don't rent any space from the towns to put your popcorn machines out there?

A. No. Sometimes, we have had to move them back in.

Q. Popcorn sales are on while the performance is going on, is that right?

A. Yes.

Q. And when the theatre closes, you close the popcorn machines?

A. Yes. We have some competition in it, too.

Q. You have figures, that we didn't read here, that show the percentage of your gross that comes from popcorn sales, don't you, you show the percentage of total gross receipts from sales of popcorn, is that right?

A. They don't show, but it could be easily figured out, I could tell you if you wanted to know.

Q. I am just going by the record you gave.

[fol. 2872] A. I can tell you right now if you want to know.

Q. I would rather see the original actual figures. You have kept those records, you had those for every year from 1935 through 1939, inclusive, that is right?

A. The popcorn business with us, Mr. Wright, is something sort of new.

Q. Well, the extent to which popcorn figured in your gross receipts is not shown by records which you have kept for all of the years from 1935 through 1939, that is right, isn't it?

A. Yes. I can tell you our gross popcorn receipts and gross theatre receipts, is that what you are asking about?

Q. I just asked you if you had the record which showed that?

A. I am sure our books would show that, yes sir.

Q. The only tabulation you offered here related to the year 1940 and I just wanted to be sure that was not because you only had the records for 1940 and did not have the records for former years?

A. No, we keep records on all of our transactions.

Mr. Waller: Was there any other year you wanted on that?

Mr. Wright: I don't want any of it. I don't think that this year is material.

Q. These figures you have quoted, you have just figured [fol. 2873] by taking the gross revenue from the popcorn and deducted it from the cost of the popcorn and the cost of the salary of whoever was handling the machine and selling, is that right?

A. No, that is not right.

Q. How did you figure it?

A. We took the net profit, as it appeared on our income tax, we took the gross sales——

Q. Just a minute. Your tax return doesn't segregate the profit.

The Court: When you arrived at that net profit for your popcorn, what expenses did you take into consideration?

A. We took all expenses into consideration, other than electricity, which we could not segregate and any rental of space where the machine is located.

Mr. Wright:

Q. You didn't allocate any of the general theatre main office overhead, did you?

A. No sir, we didn't do that.

Q. Or theatre operating expenses?

A. We took the depreciation of the machine and salaries paid and the cost of the popcorn supplies itself.

Q. You didn't attempt to measure, in dollars and cents, the extent to which the operation of the theatre contributed [fol. 2874] to the popcorn business?

A. The only way I can answer that is, in a number of theatres, before we put popcorn machines, we knew what our expenses were, and we know what our expenses were after the popcorn machines were put in, and it didn't cost us any more.

Q. I understand that. Now, this screen advertising. You also have figures which showed exactly what proportion of your receipts came from screen advertising for all the years from 1935 down to the present, don't you?

A. Yes sir.

Q. And in figuring what was the profit from screen advertising, I believe you testified that there was no expense at all, you just took the receipts that came in from screen advertising and called that profit, is that right?

A. That is correct exactly.

Mr. Wright: I move to strike the tabulations that have been brought and read in evidence here as to popcorn and screen advertising. They don't throw any light on the issues here.

Mr. Waller: We would like at the same time to move to strike all the income tax figures that the Government has put in.

Mr. Wright: These figures do not in any way tend to explain the gross income figures or have any relation to them [fol. 2875] whatever, which are in evidence.

The Court: As I understand it, the figures on the popcorn sales only apply to the year 1940.

Mr. Waller: We produced them for that year and I think they reflect——

The Court: That is the only year I can consider.

Mr. Waller: I think the fact that popcorn sales and screen advertising are a very important item in the earnings of this corporation, and so testified to, should be considered.

The Court: It may be. If you want to submit figures, I can tell more about it. You only submitted figures for 1940.

Mr. Waller: I was under the impression the Government introduced income figures for prior years and they had not submitted income figures for the year 1940. I would like to ask at this time to be permitted to offer similar exhibits for 1939.

The Court: All right.

Mr. Waller: And 1938, if your Honor would like to see them.

[fol. 2876] The Court: It isn't a question of what I would like to see; it is a question of what you want to submit. As it is now, I know nothing whatever about the income from the sales of popcorn for the years 1936-1937, 1938, or 1939.

Mr. Waller: We would like to supply those figures for at least 1939.

The Court: As it now stands, the figures you supply for the year 1940 don't in any way reflect on the income that has been produced by the Government for the years 1935, 1936, 1937, 1938 or 1939.

Mr. Waller: I think the evidence shows, your Honor, that the income tax figures that have been submitted are not relevant or material to any issue in the case.

The Court: I ruled the other way on particular figures.

Mr. Waller: We would like to have those others marked.

Mr. Wright:

Q. This comparison, this percent comparison on the tabulation, that is labeled, "per cent comparison of Saturday on Western feature operation as against the feature busi-[fol. 2877] ness of other days in the week, covering a period of June 30, 1939 to June 30, 1940." That is a somewhat misleading label, is it not, in view of your statement that those Saturday operations also included the exhibition of a regular feature in addition to the Western?

A. No sir, I wouldn't think so, Mr. Wright, because there are some spots where we didn't run double features regularly on Saturday.

Q. How about those spots that you put in the tabulation, do you know whether they were double feature or single feature during this period.

A. May I see the tabulation?

(Handing witness document.)

A. (Continuing:) The B-house in Greenville, Tennessee, is a single feature house. It shows 47 per cent of the business done on Saturday.

Q. I understand all those are single feature houses, in the sense that they normally play single features.

A. I am speaking of Saturdays here.

Q. In your single feature houses, you run a special Saturday bill in which you will run a Western along with your feature, is that right?

A. In Greenville, Tennessee, in the B house we don't run a feature on Saturday; we run merely the Western.

[fol. 2878] Q. Are you quite sure about that, for that period that is covered there?

A. Yes sir.

Q. Did you make any personal examination of the records which show the title and character of the pictures which were played at that house during that period?

A. Yes sir, I inquired to find out.

Q. Go ahead. You say that the theatre you have listed there is the B. house is that right?

A. We have listed both the A house and the B house. You asked me, as I understood, which theatres had double features on Saturday and which ones did not.

Q. What are the facts with respect to the A-house which you have got listed there?

A. I think the A-house has double features, but I would have to check that.

Q. You hadn't checked it when you prepared the list, is that right?

A. I saw no reason for checking it at that time. I did not anticipate this question.

Q. What can you tell us about the rest?

A. In the Rockwood towns of Central City, Guthrie, and Cowan, we regularly run a single feature instead of a double feature. That is, we only use the Westerns on [fol. 2879] Saturday. Guthrie, I would like to qualify it by saying that the majority of Saturdays during the year.

Q. Are you talking about your present program policy, or are you undertaking to say what happened during this particular period that is covered by the tabulation?

[fol. 2880] Q. Are you talking about the present program policy or are you undertaking to say what happened during this particular period that is covered by the tabulation?

A. Well, it is just within the last two or three years that we have started using double features on Saturday.

Q. I don't think that answers my question.

A. Prior to that time we used single features. Is that what you mean?

Q. I say, are you just testifying now from your general knowledge as to how you are conducting the business or are you undertaking to testify from a knowledge as to what features were shown in those particular houses during the particular period of time that is covered there?

A. I understood your question to pertain to this particular subject, which was for the year ending June 30th, 1940——

Q. Yes. Now, can you tell me——

A. —and it is my understanding that in the B house in Greeneville, Tennessee, and in Harriman, Tennessee we use a single feature, a single Western.

Q. Do you use it now or used it during that period?

A. During the period specified. However, I will be glad to corroborate this statement, attempt to check it further and see if I am correct.

Q. You couldn't tell me off-hand at this time the name of any Westerns that played at any of those houses on a [fol. 2881] particular Saturday, could you?

A. I wouldn't attempt to.

Q. Go ahead.

A. No, I wouldn't attempt to. I mean it would be physically impossible for me to remember the titles of two hundred and some odd pictures.

Q. You are giving us your best recollection as to the general course of your business or you are not undertaking to testify as to what your records show as to the features that played those houses, are you?

A. Mr. Wright, I must have misunderstood your question. I said if you want additional information I will be glad to get it for you.

Q. I don't want any additional information. I simply want to know what this information is based on and how it was made up. Tell us the rest of it.

A. The only way I can tell you about this—I might tell you about this, about the Crescent Amusement Company towns, that there—we keep a little book showing the total gross for a given week in a given town. That gross includes popcorn receipts. We also have another column that shows the Saturday business but does not include the popcorn income on that particular date, so these figures are misleading in this sense, that, for example, in one of these towns where we show we did 43 per cent of our theatre business on Saturday we actually did 44 to 45 per cent of our business on Saturday.

[fol. 2882] Q. Who prepared the tabulation you have got in front of you?

A. The auditor for the Crescent Amusement Company, Mr. Webb Hays.

Q. He is available here, is he not?

A. Yes sir, he lives here in Nashville.

Q. Go ahead.

By Mr. Armistead: There is no question.

By Mr. Wright: Well, I asked him to tell me about the rest of the items there; go down the list at each of those places where they have double features and where they don't have double features on Saturday.

A. I said I don't know as to the A house in Greeneville, and the B house single featured.

Q. Now, how about the others?

A. The same is true with respect to Harriman, the B house, and I shall be glad to check that and give you the exact information, if you wish.

Q. You don't know whether the A house double featured on Saturday or not?

A. I think it does, yes sir.

Q. Well, do you know whether they use—whether one of those features is a Western or not?

A. Yes sir, it is.

Q. How about the other?

[fol. 2883] A. Those are the only two that I can definitely answer.

Q. As to the others that are shown there you don't know whether during that particular period two features were shown or one feature and a Western or one Western, is that right?

A. I would want to check up before I would hazard a guess on it or make a positive statement.

Q. Well, the answer is, you don't know, then?

A. Yes sir, that is true.

Q. Well, as a matter of fact, these figures of percentage of business relate to total admissions, don't they, number of admissions?

A. No, they don't. They represent the dollars and cents, the percentage of dollars and cents that was taken in on Saturday as against the total dollars and cents that was taken in on the whole week.

Q. You are sure of that?

A. I am positive.

Q. But you didn't make up the table yourself?

A. No, but it was made up at my suggestion.

Q. Mr. Hays told you that that is what this represented?

A. Yes.

Q. Gross receipts and not the number of admissions?

A. Yes sir, that is right. We had no idea of making it up as to the number of admissions.

Q. Now, this same data that Mr. Hays made up this [fol. 2884] tabulation from is kept and is available for all the theatres during the prior years from 1935 to 1939, inclusive, is that right?

A. That is right. We merely tried to select towns from each geographical location that was affected in this lawsuit.

Mr. Wright: I move to strike these exhibits, I don't think any proper foundation has been laid for them. The witness who has testified about or identified them doesn't know—he didn't prepare them and he doesn't know what they show or what they don't show. They purport to cover a two year average, or one of them includes a year in which we have offered figures for, and one which does not. That one there covers the fiscal year ending June 30th, 1940, is that right?

A. That is right. And the other one is for a two year period.

Q. I will hand you this tabulation entitled Percentage comparison on Saturday Western feature operations as against average business for other days in the week, period covered calendar years 1939-40 for Cherokee and Rockwood, and ask you if you can tell me exactly what the policy of each of those theatres that are listed on there was on Saturday during that period.

A. I couldn't make a positive statement about that without checking the records. Generally speaking, the policy was double feature, a Western and another feature.

Q. How did you happen to take two years and combine them into one instead of showing each year, do you know?

A. This report, report for the Crescent Amusement Com- [fol. 2885] pany was prepared by Mr. Webb Hays, auditor for the Crescent Amusement Company. The report for Cherokee and Rockwood was prepared in my office by our bookkeeper, and I presume that I was not specific enough in that respect.

Q. How did you happen to tell your bookkeeper to take two years and put them into one, 1939-1940?

A. How did I happen to do it?

Q. Yes sir, what was the purpose of that?

A. There wasn't any purpose at all. I told him I wanted to know what percent of our total week's business came in on Saturday.

By the Court:

Q. What he means is, why did you happen to select those two particular years.

A. Judge, I was speaking, talking about it to two individuals at two different times, and I told them that we wanted to know what percent of our business, of a week's business was done on Saturday and I would like to have it for the last year or two and the boy in the Rockwood office took me literally with regard to a year or two and Mr. Webb Hays took a year.

Mr. Wright:

Q. Who is the boy in the Rockwood office who prepared it?

A. I think two of them worked on it, Mr. Caruthers and Mr. Rothberg. Mr. Caruthers is the bookkeepeer and auditor for the Rockwood Amusement Company.

[fol. 2886] The Court: I will have to sustain the motion.

Mr. Waller: Well, your Honor, there has been a good many tabulations and exhibits put into the case without requiring strict identification and complying with the strict rules of evidence, and under the circumstances I would ask leave to recall Mr. Stengel or recall whoever would be competent to prove these things in a legal way.

The Court: You can call the party that prepared the figures.

Mr. Wright: It is not a question of——

Mr. Waller: I want to put the Government on notice, however, that from now on we will call them to the same strict rule of evidence.

Mr. Wright: It is not a question of strict interpretation of the rules of evidence. It is a matter of knowing what the exhibit shows or what it doesn't show. We don't care about them being brought to the stand if anybody can make clear exactly what this data is supposed to show and what it doesn't show. Certainly Mr. Stengel hasn't been able to tell us.

A. What is it you want to know, Mr. Wright? Maybe I can help you.

[fol. 2887] Mr. Wright: He is just offering an exhibit and I don't think anything that is in there has any relevancy to the issues in the lawsuit. The objection we are discussing

here is, even if they did, the figures haven't been properly authenticated.

Mr. Waller: Well, I ask leave to recall Mr. Stengel, your Honor. If that is not satisfactory, then we can call the bookkeeper. As I understand Mr. Wright, he doesn't insist on the bookkeeper.

Mr. Wright: Just so we have someone who knows what he is talking about when the exhibit is handed to him.

The Court: All right, I sustain the objection. Go ahead and handle it in the manner you think proper.

By Mr. Wright:

Q. I show you this memorandum, Mr. Stengel, one about Harriman, one dated July 1st and one July 2nd, 1938, and ask you if you can tell me in whose handwriting that appears.

A. Just as to the handwriting, I have never seen it before, and I don't recognize the handwriting.

Q. Have you ever had anybody to make reports for you as to your operations, comparative operations in certain situations?

A. Well, I might make this statement, if a competitor has [fol. 2888] something for the convenience of the public that we don't have, we would like to know about it so we can get it.

Q. Did you ever send anybody into a town to make such a report for you about what a competitor has got as compared with what you have got?

A. I don't know that we have expressly sent them in there to check up. We have certainly had them volunteer. You see, each one of our managers is on a bonus basis and he can think of a dozen reasons why he should get more business and how he could get more business if certain things were not in existence, and he is always calling those particular things to our mind or to our attention.

Q. Well, you think that report was probably made by one of your managers?

A. I wouldn't want to even hazard or speculate a guess as to who did it.

Q. You don't recall ever having asked anybody in your organization or outside of it either for a report on Harriman?

A. I don't recall any specific case, Mr. Wright, other than you are always interested in what the other fellow has. If

I went to Harriman I would go by the other fellow's place to see what kind of theatre he had.

Q. Well, the answer is you don't recall?

A. The answer is, I don't recognize the handwriting and I don't recall; no sir.

[fol. 2889] Re-direct examination.

By Mr. Waller, for Defendants Rockwood, etc.:

Q. Mr. Stengel, you were asked by Mr. Wright in regard to the negotiations with Fox of a second run deal in connection with a franchise; I believe you stated that Fox wanted a larger number of second run pictures in your commitment than you wanted, is that correct?

A. That is correct.

Q. And you said something to the effect that 26 pictures was a good commitment in a second run deal; is that correct?

A. Yes, I made that statement.

Q. Now, why is a fewer number of pictures a good commitment in a second run deal than in a first run deal?

A. Well, generally speaking, with respect to small towns, there isn't any film company that makes over six or eight or ten pictures that are outstanding pictures during the year, and there is no reason to repeat a picture or play it second run in a town or make a definite commitment for some pictures you know won't stand up. They don't have box office value in the first instance, and they have less box office value in the second instance.

Q. You mean that there are pictures that you would be willing to play once in a town but that you wouldn't be will-
[fol. 2890] ing to play twice in a town.

A. Yes, sir.

Q. And for that reason you want a shorter run on the second run deal than on the first run deal?

A. Yes, sir.

Q. And when did you first start to negotiate with Fox about this second run?

A. I believe, on or about the same time that the first run deal was agreed to, or very soon thereafter; Mr. Wilson came to Nashville and——

Q. Well, was it after this correspondence about the repeat run clause that you first took up the question of second run contracts?

A. No, no; it was before that.

Q. And you were negotiating about that proposition all along?

A. Yes. We naturally tried to buy as few pictures as we possibly could run second run, because, because your pictures that had played first run and had to play second run theaters, B houses; this wasn't the biggest value to play in an A theater.

Q. Well, did you as much as possible try to get any first run pictures run second run?

A. Yes.

[fol. 2891] Q. Does that prevent you playing second run pictures over and above the first commitment?

A. Oh no.

Q. You were asked by Mr. Wright with regard to the size of the lot, or the size of the location that you leased in McKenzie, Tennessee, before you actually bought a different location. Why was it that you leased the first location in 1939?

A. We were going to build a theater there, and we had reason to believe or we were told that we could get the building next door. However, this location is a hundred per cent location, and by that statement I mean this: that store building is located in the center of the best business block in town, the block with the most stores in it, and the block that has the greatest number of pedestrians walking along the street.

Q. Did you have that location in actual contemplation as a theater location?

A. We did.

Q. You were asked about a letter that you wrote to Mr. Barnard on August 15, 1938; do you know whether you sent that airmail or not?

A. No; there would be no reason to send it air mail.

Q. I want to call your Honor's attention to this deal 21, [fol. 2892] the application date is May 5, 1938, and the opening date is August 16, 1938, and provides admission price for adults 15 cents and children 10 cents. Now, Mr. Stengel, in regard to this Madisonville and Earlington situation, prior to the writing of that letter what had been Mr. Dozier's custom and practice with reference to the advertising of pictures which he was going to play in Earlington; I mean, as to whether they were ads anywhere outside of Earlington?

A. Well, his customary practice was, he would run an advertisement in the Madisonville newspapers, and then he would buy window-cards and put them up all over town in Madisonville in the business section, that he had certain pictures playing on certain date or dates in his theater in Earlington.

Mr. Waller: That is all, your Honor, except recalling Mr. Stengel on these other matters.

Recross-examination.

By Mr. Wright, for the Plaintiff:

Q. One thing I forgot to ask you about before, Mr. Stengel: And that was, you referred to this block of five Paramount that you just negotiated for?

A. Fox-pictures for Paramount Theater.

[fol. 2893] Q. That was for the Paramount Theater that you were talking about?

A. Yes, sir.

Q. Isn't that also covered by your franchise?

A. I think it is covered by—I am not sure whether it is or not but if it is, why, they are not serving us under the franchise because of the conference that you (Mr. Wright) have had with Mr. Johnson, that the franchise is illegal. I don't believe we have a franchise, first run Nashville, for Fox; I am reasonably sure we don't.

Q. Now, after you left the witness-stand for this last recess, did you discuss your testimony with anybody?

A. No. I think I can tell you about everything that I said——

Q. I don't want to hear everything you said; I want to know if you discussed your testimony with any one?

Mr. Waller: In that connection, I have seen Government counsel discussing testimony with their witnesses at very nearly every recess that has taken place, your Honor.

The Court: What is the purpose of it?

Mr. Waller: I don't know what he had reference to.

[fol. 2894] Mr. Wright: Well, let him answer; and if he says he did not, there is nothing more.

The Court: Well, he has a right to discuss it with his counsel.

Mr. Wright: There has been quite a distinct change between his first testimony in the discussion of the second fun-

with Fox and what he has just given his counsel on re-direct examination.

Mr. Waller: That is an incorrect statement, your Honor.

Mr. Wright: That remains to be seen from the record.

A. I think I told Mr. Waller this, at noon recess, that in regard to first-second run; I think he asked me the question if they were negotiating second run and I said yes, and he said, Well, what happened? And I said, Well, the negotiations fell off because we wouldn't take as many of the pictures as they wanted to sell us, and I told him we would only take so many, and we talked about whether pictures second run were offered Gadsden, that is, second run. I believe that is about all I told him on that occasion.

[fol. 2895] Redirect examination.

By Mr. Waller, For Defendants:

Q. Mr. Stengel, you recall that there was a second run Fox contract in this theater in East Gadsden, the Dixie Theater, in East Gadsden, when Mr. Crawford was the Manager of that theater?

A. Yes.

Q. Is that what you were mentioning, what we were talking about during the noon recess?

A. That is what I was talking to you about. When we told them we couldn't take but so many at a time, they went ahead and sold what we would want them to sell.

By Mr. Wright, For the Plaintiff:

Q. One other question, Mr. Stengel: In the letter you wrote to Mr. Barnard were you referring to the admission prices of children or adult admission prices?

A. No, sir, we were referring to adult admission prices.

And further this deponent saith not.

The Court: I don't quite understand the statement, Mr. Wright, that he changed his statement or testimony about Fox.

Mr. Wright: His original testimony was that they stood [fol. 2896] by the original deal without any second run at all; and the deal sheets plainly show that it wasn't after the second run and repeat option proposition that they were

rejecting and they got together and made up deal sheets for a second run for a number of the Crescent towns which are shown in the franchise.

The Court: You mean at the noon recess?

Mr. Wright: No, I mean the last one that occurred here.

The Court: I see.

Mr. Wright: The recess that occurred between by cross-examination and his re-direct.

Mr. Raftery: I think it would be well to wait and read that record tomorrow morning.

Mr. Waller: Mr. Wright in his question, insinuated that that was true, and I was trying to bring out in another question that it was not true. I think it was a question of counsel forming a question in order to get a response that [fol. 2897] was not entirely in accordance with the facts.

Mr. Wright: I don't think it needs to be argued now, but we will take the position that this is exactly what did happen; that the second run deal was not made until after the repeat option couldn't be got over, and the record shows that.

Mr. Waller: Your Honor, the date of the deal sheets, as I get it, December 14, 1939, which was after the date of this correspondence. But the question I was asking Mr. Stengel, and what I thought Mr. Wright was trying to get at, I understood Mr. Wright had insinuated that they didn't start negotiating second run contracts until after this correspondence about this repeat run clause.

Mr. Wright: No, the point was that they didn't need or want the second run deal there until it appeared that they couldn't tie up a second run, buy a second run option.

[fol. 2898] KERMIT C. STENGEL, Being Recalled by the Defendants, he having been previously duly sworn, testified further as follows:

By Mr. Waller, For Defendants:

Q. Mr. Stengel, when you were last on the witness-stand you testified concerning the proportion of the net profits of Rockwood Amusements, Inc., for the year 1940, which were attributable to dividends from other corporations, and the proportion attributable to popcorn sales and screen advertising, and the proportion attributable to theater oper-

ations, including real estate leases; since you were last on the witness stand have you prepared similar data for the year 1939?

A. Yes, sir.

Q. For the year 1939, will you state the percentage of your net profits attributable to each of those three items—and I assume that you figured the net profit in the same way that you explained previously on the witness stand, is that correct?

A. Yes, sir.

Q. In other words, rent, popcorn sales and screen advertising you did not deduct overhead expense but did deduct actual expenses, such as cost of the popcorn, salary of the popcorn boy or girl and the depreciation on the pop-
[fol. 2899] corn machine?

A. Yes, sir, everything but electricity and any rental space that might have been set up for placing the machine in the lobby of the theater.

Q. Now, in 1939 as well as in 1940, was it true that there were no additional overhead expenses as a result of these two activities?

Mr. Wright: If the Court please, that is a pure conclusion there, as to what expenses there were incurred by the activities; it is a matter of accounting theory as to whether expense you should charge your theater operating expenses to an activity which obviously depends for its very existence on the operation of the theater.

The Court: Well, what he has in mind is, as I see it, the actual overhead expenses; what were incurred would have been incurred whether he had a popcorn machine or not.

Mr. Wright: Well, that is true as to tickets; I suppose you could say that the first hundred tickets were charged
[fol. 2900] against the cost of operating the theater, and the last hundred tickets would represent revenue against which no costs should be charged.

The Court: Well, that is not a comparable situation, because they are the same activities.

Mr. Wright: Well, my point is, there is just as much reason to charge theater overhead against screen advertising revenue, popcorn sales or anything else; it is incidental to the operation of the theater as a charge against tickets admission revenue.

The Court: That might be true for income tax purposes.

Mr. Wright: Well, for any purposes of accounting; that is a very complex accounting question, as to whether or not these expenses of operating theaters are properly attributable to the income that is derived from popcorn sales and how much they should be charged against that; that isn't something of which I think Mr. Stengel or myself is an authority, but I can at least recognize the existence of the question.

Mr. Waller: I don't think it is an accounting question. [fol. 2901] We have stated how we got up the figures.

The Court: I assume that the percentage from popcorn sales would be greater in proportion to the net profit of the operation of a motion picture theater after overhead expenses were deducted, than it would be if the gross receipts, if it were presented on the basis of the gross receipts from the sale of popcorn, before deduction of expenses, would be to the gross receipts of the theater before deduction of expenses and depreciation; and for that reason, counsel presented it in that form.

Mr. Wright: Well, it is a very obvious distortion, your Honor.

The Court: Of course, it is more favorable to them, on the theory that if they were operating a motion picture theater that they would have incurred these expenses, regardless of the sale of the popcorn and that the sale of the popcorn was more or less a side line; and I will consider the evidence in that light.

A. Mr. Waller, I might make the statement that I spent four or five years doing accounting work; so I am somewhat familiar with accounting procedure.

[fol. 2902] Mr. Waller:

Q. Well in any event, Mr. Stengel, is that the way the figures were gotten up, I mean you got the figures for 1939 as you previously explained for 1940?

A. That is correct.

Q. As a materr of fact, regardless of accounting procedure——

The Court: Excuse me just a minute. It might be a matter of preference, the examination that you have or cross-examination on a proportion of gross.

Mr. Waller:

Q. As a matter of fact and without regard to accounting theories, as to whether or not you should allocate overhead to popcorn sales or not, were your overhead expenses increased by your screen advertising and your popcorn sales?

A. No increase. I will say no. Amplifying or qualifying the statement to this effect; that any increase in expenses was deducted and charged up against the operation of the popcorn, in computing this tabulation.

Q. Will you explain further what you mean by that? So that there can be no misunderstanding how the figures were gotten up; in other words, what were the deductions?

A. We deducted the depreciation on the popcorn machines, the cost of popcorn supplies, the cost of the person [fol. 2903] or attendant at the popcorn machine, the bonus which is paid to the manager of the theatre, which bonus is based on the grosses of the popcorn receipts. We were unable to arrive at the amount of electricity used by the popcorn machines, and we did not set up any rents for having the machine in the lobby of the theatre.

Q. Any rent would be a theoretical amount as I understand it?

A. Certainly, yes, sir.

Q. In other words, you did not have to pay any additional rent to any landlord or any one who owned the theatre, from whom you were renting it for the privilege of putting the popcorn machine in there?

A. No, sir.

Q. Now on that basis will you state for the year ending December 31, 1939, what percentage of the net profit of Rockwood Amusements, Inc., came from dividends of other corporations, what percent of the popcorn sales and screen advertising, and what per cent from the other operations, including not only the operation of your theatres, but the leasing of any real estate you owned?

A. May I read this as I have prepared it?

Q. Yes?

A. Rockwod Amusements, Inc., ended December 31, 1939, a total net profit of Rockwood Amusements, Inc., for the [fol. 2904] year 1939, including dividends received from other corporations represents one hundred per cent. The entire net profit from popcorn sales, plus screen advertising

for the year 1939 equals 29 per cent; the net profit of our theatre operations for the year 1939 equals 55 per cent. In connection with that particular figure that also includes any rentals from real estate, the dividends received from other corporations for the year 1939, represent 16 per cent.

Q. Now did you figure the ratio between popcorn sales and screen advertising and the net profit of the theatre operation, but excluding dividends received from other corporations?

A. Yes, sir.

Q. Will you state what that ratio is?

A. The net profit on popcorn sales, plus screen advertising for the year 1939 equals 34.4 per cent of the net profit, exclusive of dividends received from other corporations.

Q. Now in 1939, did you sell popcorn in all your theatres during the full year?

A. No, sir, we did not.

Q. In several situations did you sell popcorn during the year 1939, during only part of the year, and what was the number of weeks in each of those situations when you did actually sell the popcorn?

[fol. 2905] A. We started selling popcorn at the Rex theatre, Cowan Tennessee, on eight, twenty-eight, thirty-nine, and that represented a total of seventeen weeks of operation. The Lyric theatre, Guthrie, Kentucky, started selling popcorn on June 12, 1939, and twenty-nine weeks of operation. The McKenzie theatre, McKenzie, Tennessee, started selling popcorn April first, 1939, and there were thirty-nine weeks of operation. The Lyric theatre Rockwood, Tennessee, started selling popcorn January 21, 1939, and that represented 49 weeks of operation. The Dixie theatre, Tracy City, Tennessee, started selling popcorn on August 28, 1939, and that represents eighteen weeks of operation.

Q. Now what is the total number of situations, or what was the total number of situations in 1939 of the Rockwood Amusements, Inc., as distinguished from its affiliates?

A. Twelve towns.

Q. The other seven of those towns had popcorn sales during the entire year 1939?

A. Yes, sir.

Q. In 1940, as I understand it, all twelve of your towns had popcorn sales during the entire year, is that correct?

A. That is approximately so.

Q. Is that correct approximately?

A. It is approximately correct, some of the theatres did [fol. 2906] not sell the entire year.

Q. Now with reference to the Saturday business of Rockwood and Cherokee affiliates, have you made up a new exhibit covering the years 1939 and 1940, covering three Cherokee Amusement towns and four Cherokee towns, showing the ratio of the Saturday days to the other days of the week, and specifying all those on which only a western picture, as distinguished from the Saturdays on which a western and a feature, or another picture was shown?

A. Yes, sir,

Q. Does that tabulation include the same situations as were covered in the tabulation which you have previously introduced, or were there any substitutions, and if so, where?

A. Providence, Kentucky was eliminated, due to the fact that we previewed certain of our Sunday shows on some of the Saturday nights involved in this two year period, and we therefore eliminated Providence, because we thought it might be confusing.

Q. In other words, at Providence you did have some feature you showed on Saturday, that you felt might have some effect on the Saturday receipts?

A. That is correct.

Q. And therefore you eliminated it from the distribution [fol. 2907] which *which* you think affected it?

A. Yes, sir.

Q. They are any others?

A. Yes, sir, Palace Theatre, Greenville, Kentucky, was eliminated for the reason we had what we term owl shows on Saturday night, which are late shows that start about ten o'clock, and we used a feature picture usually quite a scary picture.

Q. Did you put in two Kentucky towns in place of those you left out?

A. Yes, sir.

Q. What two Kentucky towns did you put in?

A. Central City, Kentucky, and Guthrie, Kentucky.

Q. Now, Mr. Stengel, with reference to the Cherokee town of Oneida, Tennessee, which was included in your other tabulation and is also included in this one, your former tabulation showed that the Saturday business was 39 per cent of the average daily business, and exclusive of Saturday was 10.2 per cent; have you segregated the number of Saturdays when you had a double feature program from the number of Saturdays when you had a single feature program; have you done the same with the other three Cherokee towns?

A. Yes, sir.

Q. What did you find with reference to those towns, and [fol. 2908] whether with a single or double feature?

A. In the Cherokee towns very few single features were used on Saturday.

Q. I notice you have a single feature on Saturday in Oneida, Tennessee; was that a western picture?

A. Yes, sir it was.

Q. What per cent of your business on that Saturday as compared with the average daily business of the other days of the week?

A. That Saturday's business represented 30.2 per cent of the entire week's business.

Q. I do not believe you have the other daily average figures, have you?

A. No, I do not.

Q. Now on the Spruce Pine, North Carolina, situation; how many single feature Saturdays?

A. There were three single feature Saturdays.

Q. And what was the Saturday percentage there?

A. 39.3 per cent.

Q. In Lenoir City, Tennessee, how many feature Saturdays?

A. One.

Q. What was the percentage on that?

A. 32.1 per cent.

Q. Coming down to McKenzie, Tennessee, in Rockwood; that was also in your other tabulation?

[fol. 2909] A. Not Rockwood, Rogersville.

Q. McKenzie, Tennessee, I intended to ask you?

A. Yes.

Q. That is a Rockwood town, is it not?

A. Yes. I misunderstood you.

Q. How many single feature Saturdays in the year period?

A. Fifteen.

Q. Were those fifteen Saturdays days on which nothing was shown but a western picture and shorts, of course?

A. That is correct.

Q. And on those fifteen Saturdays where only a Western picture was shown, what was the ratio of the Saturday business to the business on the other days in the week?

A. 40.8 per cent.

Q. Now on the 76 Saturdays when in the tabulation where double features were shown, what was the Saturday Business as compared with the business of the other days of the week?

A. 39.5 per cent.

Q. So there you had a higher daily average on the Saturday's where you had a western plus another feature?

A. That is correct.

Q. In Central City, Kentucky, what was the situation?

A. We did not use any double features there, there were only single feature Saturdays.

Q. What was your ratio there?

[fol. 2910] A. Saturday business represented 36 per cent of the total business done in a week.

Q. As compared with an average daily business of what outside of the Saturday business?

A. 10.7 per cent.

Q. That is the only situation shown in this tabulation where there were no double feature Saturdays?

A. That is correct.

Q. Now Guthrie, Kentucky, you also substituted, how many single feature Saturdays in the period for Guthrie, Kentucky? Seventy as compared with thirty-four with double features?

A. That is correct.

Q. What was the ratio of the Saturday business to the business in other days of the week, on the days when you had double features, including a western, and on the Saturdays when you had only the western?

A. In the case of double feature in Guthrie, Kentucky, the Saturday business represented 28.6 per cent; in the case of single Westerns for the program on Saturday, the Saturday business represented 28.5 per cent.

Q. Now Rogersville, Tennessee, Mr. Stengel, how many single feature Saturdays and how many double feature [fol. 2911] Saturdays, and what was the ratio in the case of double feature programs in Rogersville, Tennessee?

A. In Rogersville, Tennessee, there were eighty-five of them used, and the Saturday business represented 38.9 per cent of the week's business, 19 single feature programs were used and they represented 40.2 per cent of the entire week's business.

[fol. 2912] Q. Now, there, again the ratio was higher when you had a single Western than when you had a Western and another feature?

A. That is correct.

Q. Mr. Stengel, I think I overlooked asking you in regard to popcorn sales, whether you had made up a separate exhibit for specific situations for 1939, which has been included in the Exhibit for 1940 previously introduced. Have you done that?

A. Yes sir.

The Court: I am going to sustain the objection to the introduction of popcorn receipts for the year 1940.

Mr. Waller: I am substituting this Exhibit for that.

The Court: All right.

Mr. Waller: I think the real relevancy perhaps of the other one would be to show that the popcorn sales were on the increase, when they used it during all the——

The Court: But that is not an issue in the case. As I understand it, the only purpose of this evidence is to show that a part of the revenue that is shown by the income tax returns for the years 1934 to 1939 was realized from the [fol. 2913] sale of popcorn, not all from the exhibition of motion pictures. So there is no evidence of that character in connection with that year of 1940 and no reason to show it in connection with that.

Mr. Waller: Instead of marking it with the other exhibit number, the other I think has already been stricken, as I recall.

The Court: I didn't order it to be stricken, but I indicated that it would be.

Mr. Waller: I offer this in evidence.

Q. It covers the towns of Greenville and Providence, Kentucky, Manchester, Tennessee, Cowan, Tennessee, Oneida, Tennessee, and Burnsville, North Carolina.

A. Yes sir, that is correct.

Mr. Waller: We offer that in evidence as Defendant's General Exhibit No. 215.

Mr. Wright: If the Court please, I don't see what possible probative value this Exhibit has even for the year 1939, selecting these six theatres?

Mr. Waller: We have covered the over-all situation and, [fol. 2914] for illustration, we are picking out six towns.

Mr. Wright: What does it illustrate?

Mr. Waller: It illustrates that in a number of these towns, there would have been a loss if they hadn't had popcorn sales and screen advertising, which converted a loss into a profit, and I think in one of them there was still a loss.

Mr. Wright: Well, even so, what does it show, if you show that there would have been, how does that bear on any issue in the case, is what I don't understand.

Mr. Waller: If the Government will be kind enough to tell us what the issues in the case were, I would be better able to answer. I understand we are charged with being guilty of local monopolies, therefore, violating the Sherman Act.

The Court: I don't understand they complain of that. I don't understand they complain that local monopoly does that.

Mr. Wright: Even if we did, I don't see what possible relevancy the number of popcorn sales in Greenville, Kentucky in 1939, or the screen advertising carried in the [fol. 2915] theatre at Providence, Kentucky, turned a loss into a profit in the same year, how that would have any relevancy anyway.

Mr. Waller: As I understand, your Honor, the Government claims that we have these monopolies and we were making a whole lot of money because we had monopolies.

Mr. Wright: There is no question about the fact that they would not be in the popcorn and screen advertising business if people didn't come in the theatre to buy popcorn and see the screen advertising; You can't get any money for screen advertising unless you show a picture that attracts the public. It is shown they pick up some additional revenue in the form of screen advertising and in the form of popcorn sales to the people coming in and passing the theatre. But how does that throw any light on the issues of monopolies? That is beyond me.

The Court: The only purpose that I understood the evidence was being offered for, was that a part of the receipts of the business was from the sale of popcorn and [fol. 2916] screen advertising.

Mr. Waller: We are trying to reflect considerable discredit on the Government's evidence; that is the purpose of it. The Government has introduced figures that show, or, as the result of those figures, they say, that it would be proper to draw the inference that we had violated the Sherman Act.

The Court: I disagree with you on that.

Mr. Waller: That is the only thing they could introduce them for.

The Court: It is one circumstance.

Mr. Waller: I meant, one circumstance.

The Court: Haven't you rebutted that, or haven't you explained the nature of the income by evidence that, for the year 1939, as far as the income for that year is concerned, that a certain per cent of it resulted from the sale of popcorn and screen advertising? Why is it necessary to go into individual situations?

Mr. Waller: The Defendant expects to show Your Honor, that no two situations are alike; in some of them, they make [fol. 2917] money, in some of them we lose money. You can't simply take a figure on an income tax return and say that because there is an overall net profit resulting from the income, that they are monopolizing anything.

The Court: It shows the profit coming from the situation as a whole.

Mr. Waller: In Nashville, the Crescent has the Hippadrome where they have skating and various activities, that produces income.

The Court: I think it would be proper for you to show where it came from.

Mr. Waller: I don't think it is incumbent upon us to make the Government's testimony relevant; we are trying to show it is irrelevant.

The Court: No, the Government, in that respect would show the income. If there was any explanation as to where it came from, that would be a matter for the Defendant to show.

Mr. Waller: We would have to show in detail where all of it came from? I think where they show the figures, if [fol. 2918] we can show the figures have no probative value,

I think that is all that is necessary, and that is what we are trying to do with this evidence.

The Court: I agree with you on that; but I don't see how this breakdown shows that, as to these various towns. Let me see that Exhibit. (Examines Exhibit.) For instance, here, in Providence, Kentucky, you have $655.96 income from popcorn sales and screen advertising. But, if I understand the Exhibit correctly, notwithstanding that, you will have a net loss of $1280.00.

Mr. Waller: In other words, we want to show that no two situations are alike; that all these moving picture enterprises are enterprises that depend on the management, private initiative and many factors.

The Court: I think that would be competent and pertinent, if the Government had introduced as to each particular corporation, showing the income from each particular corporation. But the aggregate income of each corporation was introduced. I think it would be proper to show all [fol. 2919] that aggregate income, if you wanted to, was not from the showing of moving pictures.

Mr. Waller: We have shown that.

The Court: I think that is all that is pertinent to the issue, regardless of the individual situations. I sustain the objection.

(Recess.)

Mr. Waller: In connection with the figures as to popcorn sales and screen advertising. Mr. Stengel testified, when he was on the stand before, that those were new sources of revenue and those activities had been started in the past two or three years.

I want to call that to your Honor's attention in connection with the Government's insistence that the revenues of these companies have increased during the past four years.

In other words, the trend of the income tax for each year. [fol. 2920] Mr. Wright, if that is what it is offered for, he also testified he had figures on the popcorn sales and screen advertising for the entire period from 1934 to 1939. If there is going to be a question as to showing the trend, certainly these figures for the one year of 1939 couldn't mean anything.

The Court: The figures for 1939 will be the only figures I have before me.

Mr. Waller:

Q. In case the record is not clear, Mr. Stengel, I will ask you, when was it you started the popcorn sales and what was the trend with reference to increasing or decreasing the number of towns where you sold popcorn?

A. We started popcorn sales, generally, in 1938. From that point on, we tried them and they worked out. We may have had a machine or two in the latter part of 1937. Then we started in 1938 and in the latter part of 1938 and 1939, we put them in almost every theatre—I am speaking now of both Rockwood and Crescent.

Q. What about screen advertising?

A. Screen advertising started in the latter part of 1936. 1937 was the first contract that we had with a guaranteed payment to us each month. Prior to that time the managers [fol. 2921] would, in most cases, trade out the screen advertising for beaver board. We did get some income, but the amount was negligible.

Q. Did the screen advertising start in every town at the same time, or was there any trend on that?

A. The first contract we made with Alexander covered only the Crescent towns, but, of course, there were only a few Rockwood towns. When that deal ran out, we made a deal with MPA Services, with headquarters in New Orleans. And at that time we included Rockwood and its subsidiary companies under one contract, and Crescent under another one.

Q. When was that?

A. I couldn't be sure whether it was 1937 or 1938.

Q. It was either in 1937 or 1938.

A. That is the best of my recollection.

Q. Can you ascertain that exactly?

A. Yes sir, I can do it easily.

Q. Will you undertake to do that at the noon recess?

A. Yes sir.

Q. Now, I questioned you about your figures showing the Saturday business of certain Cherokee and Rockwood Amusement towns. I believe you have a tabulation from which you gave that testimony? I say, you have a tabulation from which you gave that testimony?

A. No, I think it is in evidence.

Q. Oh, has that already been filed? Has that been marked?

[fol. 2922] Mr. Waller: Has that been marked, Mr. Clerk?

The Clerk: Marked for identification.

Mr. Waller: No; this is the one for popcorn and screen advertising. I am asking now about the Saturday business.

A. For Rockwood?

Q. For Rockwood and Cherokee. That tabulation has not been marked, has it, Mr. Clerk?

The Clerk: No.

Mr. Waller: I want to offer that tabulation in evidence, your Honor, as Defendant's General Exhibit No. 216.

Mr. Wright: I would like to cross examine him on it before it is admitted.

By Mr. Waller:

Q. Mr. Stengel, have you prepared a tabulation for any Crescent towns?

A. Yes.

Q. Giving a comparison of Saturdays as to other days in the week where only single features were exhibited on Saturday?

A. Yes.

[fol. 2923] Q. Now, what method or procedure did you follow in making up the tabulation for these Crescent towns, and state what the towns are and how you selected them and how you went about it.

A. In the original tabulation that was prepared and discussed the other day some B theatres were included in that tabulation. In checking back, some of those theatres did not operate during the entire period a full week. For that reason they were eliminated and the tabulation that I now have was prepared on the following towns and for the following theatres. Princess Theatre, Harriman, Tennessee, a six day operation, 29.4 per cent of the business done on Saturday and 14.1 per cent on other days.

Q. Now, before you go into those figures, did you, with reference to those towns, select only Saturdays where a Western picture was shown without any other feature?

A. Yes, that is correct.

Q. In other words, you have on here "Harriman, Tennessee, 31 weeks." Now, what do you mean by 31 weeks?

A. Well, this tabulation was prepared covering the period from July 1, 1937 to June 30th, 1940, and during that period in Harriman, Tennessee thirty one single features were

shown on Saturday as compared with double features on the other Saturdays.

Q. So you haven't included on this tabulation any Saturdays where a double feature was shown?

A. No, we haven't.

[fol. 2924] Q. All right, now, what is your next town?

A. Gallatin, Tennessee, the Roxy Theatre.

Q. And is that a six day operation?

A. It is.

Q. How many weeks during the three year period was a single feature only shown on Saturday?

A. Nineteen.

Q. Now, on all of those occasions where only a single feature was shown on Saturday it was a Western picture, as I understand it?

A. That is correct.

Q. All right, what was the percentage shown on those Saturdays in Gallatin, Tennessee as compared with the other days of the week?

A. 28.8 per cent on Saturday as against 14.2 per cent average for all the other days.

Q. All right, what is your next town and what are the figures?

A. The Diamond Theatre in Bowling Green, Kentucky, a seven day operation, 34.6 per cent of the business on Saturday as against 10.9 per cent average on the other days of the week, and it covered one hundred and fifty six weeks.

Q. Now then, you mean during the entire three year period there were no double features shown on Saturday in that situation?

A. That is correct.

Q. And is that also true of the other two towns that you are going to give?

[fol. 2925] A. Yes sir, Maryville, Tennessee and Alabama City, Alabama.

Q. Now, in those other two towns where no double features were ever shown and only a Western picture shown on Saturday, what do your figures show?

A. For the Capitol Theatre in Maryville, Tennessee, 30.5 per cent is the Saturday business, as against 11.6 per cent average for the other days of the week.

Q. Now, that is a six day operation, is it?

A. That is a six day operation.

Q. All right, what is your next town?

A. The Ritz Theatre at Alabama City, Alabama, a seven day operation and the Saturday business is 28.4 per cent and 10.2 per cent average on the other days of the week.

Q. Now, that was a hundred and fifty six weeks?

A. That is correct.

Q. Now, Mr. Stengel, in preparing these tabulations did you personally supervise and assist in getting the figures from the books?

A. Yes sir, I did. I did some of the work myself and, of course, it required the assistance of four or five people and I couldn't stay with each one during the entire time.

Q. Do you have your adding machine tabulations?

A. I have all the work sheets, yes sir.

Q. Are they subject to inspection by Government counsel?

A. They certainly are.

Mr. Waller: We will offer the tabulation as to the Cres-
[fol. 2926] cent towns as Defendant's Exhibit No. 217.

Mr. Wright: I would like to cross examine him on it before it is admitted.

Mr. Waller: I suggest that before I go on, Mr. Wright be permitted to cross examine him on these exhibits, your Honor.

Cross-examination.

By Mr. Wright:

Q. This last exhibit that you just referred to, the Crescent towns, covers a three year period, does it not?

A. That is right.

Q. And the weeks you tabulated here, there is nothing to show what part of the period those weeks occurred in, in the cases where you listed 31 and 19 weeks, is that right?

A. You mean the dates of each one of those weeks?

Q. Yes.

A. There is nothing on the exhibit, no sir.

Q. Now, on this Saturday business you use a number of devices to stimulate attendance on Saturday, is that correct?

A. I don't understand your question.

Q. I say you are accustomed to using a number of different kinds of devices to stimulate attendance on Saturday at your theatres, is that right?

[fol. 2927] A. That would depend on the individual towns. Generally speaking, in the majority of cases, no.

Q. Well, as to these particular towns you don't know whether the prices on Saturday were made less than they were for the rest of the week, is that right?

A. Whether the prices are constant during the three year period?

Q. No, what the relationship of the Saturday admission price was to the admission price charged during the rest of the week?

Mr. Waller: That would be immaterial. This is dollars and cents. That wouldn't help the Government any,—if you lower the admission price and get more people. We are giving the percentages in dollars and cents and not in number of admissions.

The Court: Well, you are saying that the reason the percentage is high is due entirely to the exhibition of Western pictures.

Mr. Waller: No, not entirely. We think Saturday is the best day and that is the day we do show the Western pictures. We don't say if we showed a Western picture on Thursday we would get the same revenue. We don't insist that. We insist the Saturday crowd wants Western pictures [fol. 2928] and that is the most important day in the week for those theatres.

A. May I look at one of the exhibits, that exhibit that you are talking about?

(Exhibit handed to the witness).

A. I can very easily get the information that you want.

Mr. Wright:

Q. I don't want the information. I want to know whether you know at this time or whether you took into consideration when you prepared the table what the admission price was on Saturday with reference to what it was on the days of the week.

A. Mr. Wright, in preparing any percentage tabulation of the total gross it would not be necessary to take into consideration the admission prices charged.

Q. Well, it is a fact, isn't it, that a lot of these houses here or these theatres that you operate you charge a sub-

stantially lower price on Saturday than you do on any other day of the week?

A. No, it is not a fact.

Q. Well, you don't know what the facts are with respect to these houses that you have undertaken to tabulate, is that right?

A. I wouldn't attempt to answer your question as it pertains to a three year period without being able to tell you the facts as they actually are because in any given town one year we may charge one admission price all through the [fol. 2929] week and another year we may charge an entirely different price.

Q. And the policy may vary from week to week, is that right?

A. No, I wouldn't say that. It never has.

Q. Well, it is a fact, isn't it that the only reason why you use Westerns on Saturdays is because you play at lower admission prices?

A. No, that is not the fact.

Q. They cost you less money than the other pictures, don't they?

A. It depends on the towns you are talking about.

Q. Well, in film rental?

A. No, that is not true. In some cases it is; in some cases it is not.

[fol. 2930] Q. Well, those years, on features that you are talking about, there isn't any attempt here, as I understand it, to segregate such western features that you might have bought from major companies from features that might have come from independents, is that correct?

A. No, sir; a Western is a Western.

Q. So this tabulation probably does include a substantial number of Westerns that were released by the major companies?

A. The percentage of the whole, for any given year, would be at least,—would be less than fifty per cent, I am reasonably sure.

Q. Well, you didn't make any effort at the time you prepared the tabulation to make that segregation to see what the figures show, did you?

A. No, sir, because the purpose of the tabulation was to show the percentage of the gross.

Mr. Waller: There is no contention on the part of the Government that there are not plenty of Westerns available for this territory, is there, Mr. Wright?

Mr. Wright: Certainly there are Westerns available.

[fol. 2931] Mr. Waller: You don't contend we have monopolized the supply of Westerns, do you?

Mr. Wright: Certainly you have monopolized them in so far as the companies which we have their evidence of here in this suit are concerned.

Mr. Wright:

Q. Now, do you know whether on Saturdays there were any give-aways, or Bank Nights, or anything of that sort which might have stimulated the attendance there?

A. It would be a very rare case if it happened in any of those cases.

Q. You don't know whether it did happen or not?

A. Let me see the exhibit, please, sir. (Exhibit handed to witness). I am reasonably sure that there wasn't a Bank Night held on Saturday night in any one of the towns on that tabulation.

Q. And you didn't attempt to investigate that fact at the time you prepared the tabulation, did you?

A. Yes, sir, we did, because we thought there might be some question——

Q. Why didn't you show that fact on the tabulation, then?

A. Sir?

Q. Why didn't you show that fact on the tabulation, then?

[fol. 2932] A. I didn't think it was necessary.

Mr. Waller: I didn't catch the question, Mr. Wright.

Mr. Wright: The fact as to whether or not there were on these Saturdays Bank Nights or give-aways, or any other admission stimulant.

Mr. Waller: That is not a very fair question; you can't show everything in one tabulation.

A. I want to be sure, Mr. Wright, that my answer is understood, that there were not any Give-aways on these particular Saturdays in these particular towns.

Mr. Waller: You said "were not," didn't you, Mr. Stengel?

A. Yes, sir.

Mr. Waller: I want the Court reporter to get it that way.

Mr. Wright?

Q. It is a fact, is it not, Mr. Stengel, that on Saturday you give a greater number of shows than you do any other day of the week?

A. Well, that depends also on the town in question, Mr. Wright.

[fol. 2933] Q. Well, you at least have a matinee, you have two or three shows, whereas in the week day you just have an evening show, isn't that right?

A. Mr. Wright, I believe in every one of the towns which appear on that tabulation you will find both a night show and a matinee show on the week days as well as Saturday.

Q. In preparing the tabulation, did you make any effort to show how many shows you had on Saturday as compared to how many you had on the week days you offered there?

A. Mr. Wright, that is quite hard to show, because on any week day, one week day against any other week day, some have a feature that runs three hours: Take, Gone With the Wind: It ran four hours; we could only run that picture two or three times during the day, as against running an ordinary feature four or five times during the day.

Q. Now, Mr. Stengel, isn't it a fact that during this three-year period which these six features you have given cover here, you normally had more shows on Saturday than you had on any other day of the week?

A. Well, we might have opened at 12:00 o'clock on Saturday instead of opening at one o'clock.

The Court: What difference does it make whether you have more shows, unless the house has the capacity to take care of more shows.

[fol. 2934] Mr. Wright: Well, you would expect a greater revenue on Saturday, if you bring the audience in three times instead of once.

The Court: That is, would you say, if you had three shows with the same number of people as one show.

Mr. Waller: What we are trying to show is that Saturday is the most important day of the week and we capitalize on that by using a Western on that day.

Mr. Wright:

Q. Why is it you don't show Western every day, Mr. Stengel; why do you buy other pictures?

A. Well, Mr. Wright, we have tried it; I have tried Westerns on every day of the week; I have tried them on Sunday; I have tried them on Wednesday; and sometimes they will work and sometimes they won't.

Q. Well, the same thing is true on Saturdays, according to this tabulation, that sometimes the Westerns worked along and sometimes you had to put in another feature with them, isn't that right?

A. No, sir, it doesn't work.

Q. What doesn't work?

A. When you play anything other than a Western picture [fol. 2935] on Saturday, you drive away the business from your theater.

Q. So the purpose, then, of playing—By the way, why didn't you include in the Crescent table, Exhibit No. 217, the same comparison that you included in the Cherokee and Rockwood tables, of the proportion that resulted from single feature programs?

A. Because of the element of time in preparing those tables, Mr. Wright.

Mr. Waller: I take the blame for that, your Honor.

Mr. Wright:

Q. I notice in this Exhibit 216, you show that in Lenoir City, Tennessee that you showed double feature programs 103 Saturdays and a single Western on just one Saturday; now, were you trying to drive away business on the 103 Saturdays you showed other features than Westerns?

A. I will tell you, Mr. Wright, one of the things we tried on Saturdays to get business: We ran a serial Saturday, and the first chapter of a serial has three reels as against two reels, and quite often we will run the last chapter of the serial together with the first chapter of the next serial in order to attract business, and then if we can get some good slap-stick comedy in there, it is not necessary to run an extra feature because of the time of the show; and that [fol. 2936] might have been what happened in that case.

Q. The Saturday business, then, the programs consist not only of where you show Westerns consisted not only of a Western, but a couple of serials, is that right.

A. No, sir, that is not right.

Q. Well, you don't know, with reference to any of these particular single feature programs you have listed here, as to what the entire program was, do you?

A. Yes; I can tell you what it was.

Q. At least, it doesn't appear on the face of the tabulation?

A. No, because it runs constant. In all cases it amounts to a Western, a short subject and a serial.

Q. Well, when is it that you run these serials?

A. We run a serial, which is considered a short subject, each Saturday.

Q. Then, when you used the words "short subject" you are referring to a serial.

A. In the film business the serial, strictly speaking, is considered a short subject; and it is always referred to as a serial, because of the fact that the story isn't complete in the particular two-reel show that you get at one time. They run in 12 episodes, or 15 episodes.

Q. Now, why was it that you happened to select the period [fol. 2937] from July 1st, 1937 to June 30, 1941 for the Crescent Exhibit?

A. Mr. Wright, I don't know that there was any particular reason; we wanted to cover a sufficient period of time so it would be accurate and——

Q. And how did you happen to take the calendar years of 1939 and 1940 for the Cherokee and Rockwood exhibits?

A. Well, that is very easily answered: Cherokee and Rockwood operate on a calendar year, whereas Crescent operates on a fiscal year, which ends June 30th.

Q. I just wondered why you happened to pick two years in one and four in the other.

A. Repeat your question, please?

The Court: He says, Why did you make the tabulation for Cherokee and Rockwood on a two year basis, and the Crescent four.

A. The one we had the other day was on a two-year basis and I believe that one for Crescent was just one year; and we just made it up so we would go far enough back to be representative.

Mr. Wright:

Q. Now, you have the figures, have you not, Mr. Stengel, which you show for the entire Cherokee Amusement Com-[fol. 2938] pany year by year, just what you got out of the Saturday operation of all the theaters, haven't you?

A. Yes.

Q. You have records that will show that?

A. Yes, the daily reports show it.

Q. And the same is true as to the Crescent, there are figures available in the company's office which show what the performance was on Saturday of all of the Crescent houses?

A. Yes.

Q. During all of the year from 1934-1935 on?

A. That is right; of course, from Cherokee we would only have it from the date the company was organized.

Q. I understand; the same is true of that company.

The Court: When was Cherokee organized?

Mr. Wright: The latter part of 1936 or 1937.

A. Probably in 1936.

[fol. 2939] Mr. Wright: Your Honor, I don't think that either of these exhibits on the basis of showing this objective made here, show any other fact than that Saturday is a better day than other days, or was a better day than other days for these particular theatres for them on the periods of time that were covered here, there is nothing in either of these exhibits which will demonstrate in and of itself why the Saturday business was better than other days of the week; the complete programs are not even attempted to be tabulated here, or the inducements which might have resulted in the Saturday business.

The Court: There is no question but that it shows the Saturday business of no other towns, in any other theatres, that are not listed here.

Mr. Wright: I say even as to these houses that are selected, the theatres, there isn't any showing on these tabulations as to why Saturday business was more than any other days, it might have been due to an admission price policy, or it mght have been to an increased turnover on Saturday of the audience.

[fol. 2940] The Court: You will have to consider the exhibit.

Mr. Wright: It might have been due to a better theatre.

The Court: That exhibit will have to be considered in the light of his testimony.

Mr. Wright: I submit it has no probative value whatsoever, either one of these exhibits, to any issue we are trying here.

Mr. Waller: I want to question Mr. Stengel in general——

Mr. Wright: We certainly object to any attempt to do that.

Mr. Waller: Will you wait until I finish?

Mr. Wright: Go ahead.

Mr. Waller: I say it will be a physical impossibility to get up these figures for each and every town covered in this lawsuit, and I would also like to make this observation, that Mr. Wright's extreme concern about having everything in an exhibit that might be relevant, had not been [fol. 2941] manifested in any of the Government's exhibits, and on that standard that he would like to impose on the defendants, I doubt if any of the statistics introduced by the Government would stand.

The Court: Well, overrule the objection.

Mr. Wright:

Q. Now with respect to these exhibits that were offered about Rockwood's popcorn sales for the year 1939, there again you have the records to show and which would show the exact proportion of your gross income from popcorn sales and from screen advertising have you not, for each that Rockwood has been in business.

The Court: Do you have the records that will show that?

A. Yes.

Mr. Wright:

Q. The same is true with respect to Crescent and all these other affiliated companies, isn't that right?

A. All those figures would appear on our books, yes, sir.

Q. I believe you testified before that all of this popcorn was bought from the central office here?

A. No, sir, I did not testify that way. Bought by the [fol. 2942] man who runs the machine in some cases, in some cases it comes from Nashville here, and in other cases

it is bought locally, it depends on the grade of popcorn we can buy and we at all times try to buy the best.

Q. And there isn't any charge made against this popcorn figure for whatever home office manager's expense may be, employed in obtaining the popcorn?

The Court: No.

A. Yes, sir, there is, I was just trying to think out the answer. If popcorn costs us five dollars, that five dollars would go to that theatre.

Q. That is, the charge is made to the theatre at a higher figure to them?

A. This is charged, yes, sir, charged to the theatre at a higher figure to absorb that overhead, where it is bought in Nashville.

Mr. Wright:

Q. You do not conduct any popcorn sale operations apart from the operation of your theatres, do you?

A. Yes, we did but not in those particular figures. I don't know what you mean by that.

The Court: He means, did you sell popcorn to the public outside of your theatres?

[fol. 2943] Mr. Waller: Do you call the Hippodrome a theatre?

Mr. Wright: Let's get that straight, and as I understand, the Hippodrome the income from that goes, that is received from that, that is received by the Auditorium Company, is that right?

A. No, sir that is not right.

Q. What is the Auditorium Company?

A. I think the Hippodrome—the Auditorium Company, operates a theatre down at Shelbyville.

Q. Is there any place you sell popcorn besides the Hippodrome?

Q. Well at the theatres.

Q. Then so far as Rockwood is concerned, in these figures the popcorn sales all occurred in connection with the operation of the Rockwood theatre, is that correct?

A. That is correct.

Q. And this screen advertising you represent and refer to here consisted of advertising that was thrown on the screen in those theatres?

A. That is correct.

Q. Is that correct?

A. That is correct.

Q. And the amount of money you can get for the screen [fol. 2944] advertising depends does it not on the number of people that you can get in the theatre?

A. Not in our particular case, no, sir.

Q. Why not?

A. Because we do not sell the screen advertising,—we are guaranteed a certain amount of money, and it so happens our contract runs for several years, and if business goes up or down, it does not affect our income.

Q. You made a contract with this company, which pays you a blanket amount, is that right?

A. No, sir, it does not pay a blanket amount, it pays a fixed amount, a specific amount each month for each theatre that is listed in the contract.

Q. Yes, and I suppose that the amount that is listed for each theatre bears some relation to the capacity of the theatre to draw an audience?

A. That is true. Again it is a horse trading proposition. I tried to sell that for as much as I could get, and they tried to get it down low.

Q. In the last analysis I suppose a deal for that was governed by the ability of those theatres that you were trying to put in the deal, to attract an audience to look at the advertising, rather than some personality factors that might have entered into it by you or by whom you [fol. 2945] were dealing with, is that right?

A. I think on that particular deal, the personality had a good deal to do with it, for the reason that the person I was negotiating with had never seen these theatres and had to take my word that each one of the theatres was as represented.

Q. You were attempting to get additional revenue, you told him to some extent the amount and patronage that he might expect for the service that he was going to buy, isn't that right?

A. No, sir, I inferred it, but I never did tell him. I told him the seating capacity, what the newspaper rate was in the town, what the radio rate was in that section, and attempted to sell it in that manner.

Q. Well in any event, what you sold him was a service

which was a part of the operation of your theatres, isn't that right?

A. No, sir.

The Court: Of course if they hadn't had the theatres they would not have had advertising and popcorn either one.

Mr. Waller: There isn't any dispute about that, Your Honor.

[fol. 2946] Mr. Wright: Your Honor please, this popcorn and screen advertising exhibits, this exhibit, I do not see any basis for it, I do not see what has been said about it here, that it has any probative value in the case, it does not show that this income is derived from anything other than the theatre operations which are in question here, I do not see that in so far as Crescent's ability to exploit the situation, or get an income from popcorn sales and from screen advertising in addition to admissions that were paid by its customers, tends in any way to explain or rebut any income figures that have been put in evidence here.

The Court: Well it would only serve the purpose of explaining it, and after all it is a part of the business of the corporation, and as has been stated, if it hadn't been for the theatres they certainly would not have engaged in screen advertising or in the sale of popcorn.

Mr. Mitchell: May it please the Court, every one of the defendants objected to the introduction of the income tax [fol. 2947] matters here, and with additional objections from time to time, it seems to me that makes them irrelevant for any possible item that the defendants might wish to put in evidence, I do not see how that can be escaped.

The Court: Well I think it is admissible for that, to show how this particular income was derived; in some cases it has been derived from rents and in some cases dividends in other cases, in other cases sales of popcorn and screen advertising, whether or not that will make any material difference, is another proposition.

Mr. Wright: I think it is so trivial that it won't be worth any extended argument.

The Court: I do not think so, on the popcorn proposition. All right, go ahead.

Mr. Waller:

Q. Mr. Stengel, why is it that you, and I am referring to the various corporations with which you are connected, including the Crescent, Rockwood and affiliates, why you show a better income on Saturday.

A. Because through a trial and error method of procedure [fol. 2948] we have found that that is one factor as to more revenue.

Q. Is Saturday the day in most of these towns where there is the biggest crowd of potential theatre goers are available?

A. Yes.

Q. Why is that?

The Court: Country folks come to town.

Mr. Waller:

Q. Have you found by the process of trial and error that the country people like the western pictures?

A. Yes, sir, we have.

Q. Is that true not only in these situations but in the other towns included in the Crescent Amusement Company, Rockwood and affiliates?

A. Yes, sir, that is true. In Nashville of course you have a different situation.

[fol. 2949] Q. Well, I mean the small towns?

A. Yes sir, that is true.

Mr. Wright: If the Court please, I object to his endeavoring to give testimony here on the basis of this tabulation and say that it applies to other situations. If he wants to put in any other situation, they have the figures, they can put them in. I don't think it is proper to give a tabulation on one situation and then say "There are a lot of others that are like it."

The Court: Overruled.

Mr. Waller:

Q. Are there any pictures produced and available for exhibition anywhere in this country, Mr. Stengel, that you cannot get for exhibition in Tennessee and neighboring States, if you want them?

The Court: What is that?

Mr. Waller:

Q. I say, are there any pictures released in this country for exhibition anywhere in the country that you cannot get for exhibition in this territory if you want them?

Mr. Waller: My purpose in asking that question is, I have proved the number of releases in the country and I [fol. 2950] want to show that all of them are available right here in this territory.

Q. Will you answer the question?

A. Yes, we can get any of them. In fact, we have tried to get a number of them that were not generally released in this section, and did play them.

Q. And you did get them?

A. Yes.

Q. Do you know any reason why any independent exhibitor or any other exhibitor in this territory could not get any picture that is released for exhibition anywhere in this country, if he wants it?

A. No, unless there is some particular State's right involved.

Mr. Wright: He is obviously not competent to testify as to why an exhibtor might or might not be able to get any particular picture or group of pictures.

Mr. Waller: I think he is competent. He says he has done it, he has gotten pictures that were not generally offered.

Mr. Wright: This last question he asked him whether there was any reason why any independent exhibitor might [fol. 2951] not have access to certain pictures. There might be dozens of reasons why he couldn't get any particular picture.

Mr. Waller:

Q. Just state what you know about it, what your experience has been in that connection, Mr. Stengel?

A. One of the pictures a few years ago that was not released generally in this section was the picture "Maryling". We played that at the Belmont Theatre. There was a club formed out at the Belmont Theatre some six or eight years ago, I don't remember how long; it was a literary group that wanted certain types of pictures that were not released

by the Eight Distributors who are in this case. And we got those pictures and would run one of them each Sunday night, or probably twice a month; that was done over a period of years. Some of them were in French, or foreign languages, rather, some of them in English. They just ran the scale as to entertainment value.

The Court: What is it that prevents any exhibitor from getting any picture that he wants, if he will pay the price necessary to play it, other than the fact that it might be already sold to some other exhibitor, and the fact that certain producers might have restrictions as to places in [fol. 2952] which their pictures should be played?

A. There wouldn't be any.

Mr. Waller:

Q. Now, Mr. Stengel,——

A. (Continuing) Quite often, we will hear about a picture—not often, but occasionally we will hear about a picture that is foreign made, or may — distributed by some company other than the ones we usually do business with, and we will write and try test booking of the picture somewhere and if it works out, we may play it out in a double play. We have done that.

Mr. Wright: It is beyond me what the relevancy of this is, whether they have gotten foreign pictures in here or any other particular type of picture.

The Court: I don't see where it has any particular bearing on the issues in this case.

Mr. Waller: The reason I am asking the question: We introduced a tabulation which showed the total number of picture releases in the country, and I want to show all of those are available in this territory and there is nothing to keep anybody from getting them.

Mr. Wright: We have already conceded that anybody can open a theatre and throw on the screen an image in [fol. 2953] four or five reels, a picture that moves, there isn't any dispute about that. The only dispute is, whether he can get those which will enable him to charge an admission price to provide an audience sufficient to keep him in business.

(Recess to 1:30 p. m.)

Afternoon Session

Mr. Waller:

Q. Mr. Stengel, during the noon recess did you obtain the dates and figures relating to screen advertising, when it was started and what the trend was?

A. Yes sir.

Q. Will you state those facts?

A. The first screen advertising deal that we made on a guaranteed basis was with the Alexander Film Company and it was dated October 14, 1936 and covered the calendar year of 1937. That was for the Crescent Amusement Company and covers 26 or 27 towns and approximately 46 or 47 theatres. Included in that contract were 6 Rockwood towns, namely: Huntsville, Alabama, Guthrie, Kentucky, [fol. 2954] Tracy City, Tennessee, Lake City, Tennessee, Manchester, Tennessee and Rockwood, Tennessee.

Q. Mr. Stengel, when you say Rockwood towns, as I understand it, you are going outside of Rockwood, proper, into affiliates of Rockwood, also?

A. That is correct. The following year the Crescent Amusement Company executed a contract with Alexander for the same number of theatres at an increase of appproximately 45 per cent as to revenue, and the same 6 Rockwood towns were included in that deal. That contract was dated October 23, 1937 and was for the calendar year 1938.

The Court: Do you have the figures on the contract for 1937, that was executed in 1936?

A. Yes sir.

The Court: How much was it?

A. $15,600.00. Do you want the balance?

The Court: Well, you can give it for the next year if you wish.

A. The next year was $24.000.00.

Mr. Waller:

Q. Will you proceed, Mr. Stengel?

A. On December 14, 1937, Rockwood and its affiliate companies executed a contract with the Motion Picture Screen [fol. 2955] Advertising Company of New Orleans, Louis-

iana and that deal was for the calendar year 1938. It covered 19 towns and 19 theatres, but did not include the 6 Rockwood towns that had always been in the Alexander contract. The following year Rockwood again negotiated a contract with Moving Pictures Advertising Agency, dated November 20, 1938 and was for a two-year period, covering the calendar years 1939 and 1940.

Q. Don't go into 1940, but either give the figures or percentage increase or something to indicate how 1939 compares with the previous years?

A. In 1939, in the deal with Moving Pictures Advertising Company for Rockwood, there were 40 towns and 40 theatres included, and the two figures involved, from the 1938 deal, was for $7500.00 and the next deal for 1939 was $12,500.00. Of course, there were more towns involved there. Now the Crescent Amusement Company, on October 20, 1938, made a deal with Moving Pictures Advertising Company for the calendar year 1939 and it was for 26 or 27 towns and involved 40 or 45 theatres. And that deal amounted to $26,244.00, and the figure of $26,244.00 for the Crescent towns compared with the original deal with Alexander for the 1937 calendar year indicates an increase of 59 per cent in revenue.

[fol. 2956] Q. As I understand it, the figures for 1935, the income tax figures for 1935 do not include this source of revenue, but it does from then on?

A. In 1935 and 1936.

The Court: 1926, too.

Mr. Waller:

Q. 1936?

A. We did not negotiate or use screen advertising in all of the theatres. In some cases, as I explained before, we might have used it on a pre-ad basis or traded it out for supplies that could be used around the theatre.

Q. Mr. Stengal, there have been introduced in evidence since you were last on the stand two letters that you wrote United Artists on behalf of Rockwood Amusements Inc., one dated April 2, 1938, being Defendant's Exhibit No. 198, and the other dated April 7, 1938, being Defendants Exhibit No. 199. Now, in this letter of April 2, 1938 you refer to a request for increased rentals on the picture, "The Advantures of Tom Sawyer", in Rogersville, Tennessee, and

in which you then give certain figures as to other pictures. I ask you, what was the occasion of writing that letter? [fol. 2957] A. May I make a statement before I answer your question?

Q. Yes.

A. The figures that I just gave you in regard to screen advertising were not included in revenue from Lyric Amusement Company, Cumberland Amusement Company or Strand Enterprises.

Q. Now, going on with your letter to United Artists, I will ask you this preliminary question; Did Rockwood, on or about the 1st of January, 1938 acquire the Rogersville Theatre from the Cumberland Amusement Company?

A. Yes sir.

Q. And did you take over the film contracts of the Cumberland Amusement Company for the Rogersville Treatre?

A. Most of them, yes sir.

Q. Did you, among others, take over the United Artists contract?

A. Yes sir.

Q. Now, just state the occasion for writing that letter.

A. I received a letter from United Artists, from Mr. Dave Prince, wherein he asked for an increase in rental on the picture "The Adventures of Tom Sawyer" inasmuch as the company had decided to make the picture and produce it in technicolor, and although we had a definite contract at definite terms, he wanted to know if we wouldn't pay more, so I wrote him back and told him I would be glad to——

Q. In any event, that is your reply to that letter?

A. Yes sir.

Q. Now, in that letter and also in the letter of April [fol. 2958] 7th, 1938, which I will pass to you, you gave certain figures as to what your grosses were on certain United Artists pictures, and what I want to ask you is whether or not you can vouch for those figures? Were they taken off the books at the time you wrote the letter?

A. Yes.

Mr. Wright: How is that material one way or the other? We didn't offer these letters. I don't see what issue we are on now about the reduction of United Artists film rental——

The Court: As I recall, those letters were written United Artists in protest about the prices that were being paid for

pictures at this Rockwood Theatre and giving his grosses on certain pictures.

Mr. Waller: And the record shows that the exhibit was objected to as it was introduced to show figures. I want to establish the figures.

Mr. Wright: Even if the figures are correct, I don't see how this is material in the case, as to what he grossed on any United Artists pictures that were played there.

Mr. Waller: Well, it reflects on this letter from Mr. Miller about this $40.00 offer.

[fol. 2959] The Court: About what?

Mr. Waller: About that $40.00 offer.

The Court: All right. I overrule the objection.

Mr. Waller: If the Court please, there is one or two things I didn't ask Mr. Stengel about when he was last on the witness stand.

The Court: All right, go ahead and ask him.

By Mr. Waller:

Q. There is a letter that has been introduced in the record as Government Exhibit No. 274 from Mr. Ed. Hayes of United Artists to the Crescent Amusement Company, dated January 24, 1940, in which United Artists express regret because a picture by the name or title of "A Star is Born" was played in East Gadsden Theatre ahead of Crescent's run in Gadsden, Alabama. Have you investigated that subject to find out what occurred on that occasion and what the complaint was about?

A. Yes sir.

Q. What was that picture A Star Is Born? Was that a re-issue of some kind?

[fol. 2960] A. Yes, it was a re-issue. It had been exhibited for the first time in Gadsden a year or two prior to the time referred to in your letter.

Q. Then had the Crescent Amusement Company made a deal to play that picture in the downtown theatre or one of its downtown theatres in Gadsden proper?

A. Yes sir. We bought the picture as a re-issue but not knowing that it had been sold to play in a suburban house ahead of our downtown exhibition. Had we known that, we wouldn't have bought it.

Q. Now, was that all there was to that issue that was raised in this letter?

A. That is right.

Q. Did the Crescent Amusement Company ever ask for any clearance over East Gadsden on behalf of its downtown theatres in Gadsden in any contract?

A. No. In all the contracts that we have negotiated we have never asked that any clearance be put in the contract with respect to East Gadsden. However, there is a clause that appears in the Loews contract that subsequent run in Gadsden was to follow sixty days behind first run.

Q. I am not asking about any contracts with the Dixie Theatre in East Gadsden; I am talking about Crescent contracts.

A. I am speaking of Crescent contracts, Mr. Waller.

Q. Go ahead. What does it say?

A. It says that a picture shall play sixty days ahead of [fol. 2961] the subsequent run. We didn't ask for that clause; it was put in there.

Q. Put in by the distributor?

A. That is right.

Q. In other words, that is what you call a booking arrangement?

A. No, that is not a booking arrangement.

Q. Well, what is a booking arrangement—where the distributor specifies or fixes the interval between playing pictures?

A. Well, a booking arrangement——

The Court: That is not a booking arrangement. That is clearance. A booking arrangement is where they are set for a particular date for each particular town.

A. I think what Mr. Waller means, Your Honor,—in the case of Metro, for example, in booking towns like Tracy City or Manchester or very small towns like that, they won't make these pictures available for our use until at least sixty or ninety days after release date.

Q. Well, is that a booking arrangement or clearance?

A. That is a booking arrangement.

The Court: All right.

Mr. Waller:

Q. What I am trying to get at is: Did Crescent Amusement Company have anything to do with any arrangement, whether put in the contract or not put in the contract,

[fol. 2962] whereby East Gadsden was to play after Gadsden proper or after Alabama City?

A. No.

Q. Now, in connection with the Fox franchise I will pass to you telegram dated July 26, 1939, I think it is, and will ask you if the Crescent Amusement Company received that telegram in the ordinary course of business from Fox?

A. Yes sir.

Q. Regardless of whether the year is legible on the face of the telegram, do you know whether it was 1939?

A. Yes sir, I have the original telegram.

Mr. Waller: I would like to read this telegram and offer it in evidence, your Honor.

"Confirming our telephone conversation, this will advise you that the deal as submitted has been okehed and it is satisfactory for you to date product. The franchise will be prepared by the legal department and as soon as this is done I will send it up for your signature. Paul and I both thank you very much for your cooperation in working out this franchise. Regards.

Harry G. Ballance."

We offer that in evidence as Defendant's Exhibit No. 218.

The Court: All right, let it be admitted.

[fol. 2963] By Mr. Waller:

Q. I will now pass to you, Mr. Stengel, a letter addressed to you, on the stationery of Twentieth Century Fox Film Corporation, dated February 15, 1940, signed "Paul" and a sheet of paper on which you will find a number of paragraphs or clauses relating to this Fox franchise. I will ask you if you received that letter and the sheet of paper referred to as an enclosure shortly after the date of the letter, February 15, 1940?

A. These were both received at the same time.

Q. Well, was the sheet of paper referred to an enclosure with the letter?

A. Yes sir. It was attached to the letter.

Mr. Waller: I will ask that that letter and the enclosure be bradded together and we will offer those as Defendant's Exhibit No. 219.

The Court: All right, read the exhibit.

Mr. Waller: (Reading).

"DEAR KERMIT:

"I was under the impression that I had sent you a copy of the different clauses I requested inserted in the franchise as of our discussion while you were in Atlanta as well as exchange of correspondence in the past few months. I thought I had forwarded you a copy of this but in searching my files find that was not [fol. 2964] the case. This is for your information."

The rest of the letter is about another matter, Your Honor.

Q. Now, Paul, was that Mr. Paul Wilson, branch manager of Fox in Atlanta?

A. That is correct.

Q. Now, the enclosure, I notice, includes a repeat run clause with the proviso that the repeat run clause is to become void where a competitive theatre opens in any town. It also contains a clause about re-issues and one or two other clauses. What I want to ask you, Mr. Stengel, is whether or not, when the franchise was approved by the telegram back in July, 1939, the question of those clauses was still open?

A. Yes sir, it was, the clauses referred to there, particularly the repeat run clause and the re-issue clause.

Q. Now, so far as film rental for the pictures and the terms were concerned, did you regard them as foreclosed by the telegram and that matter ended?

A. Yes sir.

Mr. Wright: I think we are getting into——

Mr. Waller:

Q. What was the understanding between the parties as to that?

Mr. Wright: We went all over the negotiations here once as to just what happened with respect to the franchise. [fol. 2965] The Court: Well, Mr. Wilson testified that when they got down here they agreed on the number of pictures and prices that they were to pay and that he went back then and prepared the franchises, as I recall, and the

question of clearance and repeat runs was not taken up except possibly clearance as to some certain particular towns.

Mr. Wright: I don't think that is what happened, your Honor.

The Court: I don't know whether that is what happened or not. That is what I recall that Mr. Wilson said.

[fol. 2966] Mr. Wright: I would like to point this out, that what he said was that he had negotiations with Mr. Stengel and Mr. Sudekum, and then went to the typewriter and wrote up what the agreement was, and what the agreement was is in evidence as a memorandum as Government's Exhibit, I believe 286.

The Court: That is, the agreement so far as it is contained in the memorandum but he don't say that was the entire agreement.

Mr. Wright: Well, if the Court please, I certainly think that that is a fair inference from what he said it was.

The Court: It is not a fair inference from what he said it was, because he expressly said it was his entire agreement.

Mr. Wright? The agreement was set forth with respect to repeat runs in very plain language.

The Court: Well, that may be. That is Exhibit 286?

Mr. Wright: 286, I believe.

[fol. 2967] Mr. Waller: I don't think we need to depend on inferences, your Honor; that is why I am undertaking to prove what happened.

The Court: (To Clerk) See if you can find Exhibit 286, please. That is the most popular exhibit in the record, it seems. You ought to know what that is.

Mr. Waller: There is a duplicate of it.

Mr. Wright: Yes, that is the same thing.

The Court: (Ex. 286 handed to Court by the Clerk) (Court reads the exhibit.) Well, that is as to the price of the repeat run, not when it should be repeated or anything like that.

Mr. Wright: Well, it could hardly be said that the question of repeat run could hardly be left open.

Mr. Waller: I mean the phraseology, your Honor. I will amend my question.

The Court: Yes.

[fol. 2968] A. May I make a statement right there?

The Court: Just wait until he gets through. All right, go ahead and answer it.

A. What was your last question?

The Court: He says he wants to make a statement.

Mr. Waller:

Q. All right, go ahead, Mr. Stengel.

A. I just wanted to tell you that with regard to the telegram that was introduced confirming this deal, it refers to a 'phone conversation that took place between Mr. Ballance and Mr. Sudekum, and I was present in Mr. Sudekum's office at the time discussing it with him, and at that time Mr. Ballance said that he would not put the repeat run clause in the contract or the re-issue clause in the contract; and we accepted the deal, this telegram confirmed the deal, and they told us at the time if we wanted it on the regular contract form it would be all right; in other words, the contract was approved according to the terms and conditions of the standard contract form.

Objected to by the Government:

[fol. 2969] Mr. Waller: I don't insist on it, your Honor, it doesn't make any difference.

The Court: All right.

Mr. Waller:

Q. Now, Mr. Stengel, what is the difference between a re-issue and a repeat run?

A. A re-issue is a picture, generally speaking, that is shown for a second time in a town subsequent to the particular season in which it was originally released.

The Court: Well, do you mean that it is a new film, too, a newly processed film? A re-issue film is a new processed film?

A. As to the celluloid?

Q. Yes, a new copy?

A. It may be or it may not be, according to the print condition.

Q. Well, in any event, your repeat run clause and your re-issue clause are two separate things?

A. That is correct.

Mr. Waller:

Q. Now, you were asked about second runs, Mr. Stengel; I want to get one point clear about that. Do you remember [fol. 2970] negotiating for any second run contracts with Fox, or with anybody else, for towns where there was only one theater in a town?

A. No, sir.

Q. And have your second run negotiations been confined to where you had more than one theater in a town?

A. More than one theater.

Q. I mean in towns where you have more than one theater?

A. Yes, sir; you don't need a second run contract in a town where you just operate one theater.

Q. Now, on page 4776 of the record, on cross-examination by Mr. Wright, the transcript reads this way: "Q. Well, has your buying film got anything to do with your merchandising of the film; what do you mean by merchandizing of the film as distinguished from buying film? A. When we buy film in some of the towns we want two runs. Q. Want too what? A. Want two runs. The problem of zones of clearance between runs doesn't come up". Have you read that transcript since it was written?

A. Yes, sir.

Q. Is that a correct transcript of what your testimony was?

A. No, sir.

Q. What was it that you intended to say, when Mr. Wright [fol. 2971] interrupted you with his question, Want "to what" or "want two what"? Let me pass this transcript to you and ask you to look at it.

A. "We want to run the best pictures available."

Q. Now, is that what you tried to say?

A. Yes, sir.

Q. And what did you say, as you recall it?

A. Yes, sir, that is what I did say, I thought.

Q. Now, is that in both places where the "two runs" occur?

A. That is correct.

Q. You mean "to run?"

A. Yes, sir, instead of "two runs."

Q. Instead of "two runs?"

A. That is correct.

Q. Now, on page 4779 of the transcript, where Mr. Wright was cross-examining you about clearance, this occurs:

"Q. That is right, but as a general proposition when you negotiate these deals, you attempt to get just as much clearance as you can, isn't that right?

"A. Up to 60 days, and possibly, in one or two cases, 90 days, and that is my memorandum——

"Q. Well, after 60 or 90 days it doesn't make much difference to you, does it?

"A. It doesn't make any difference but that is the most we ever asked for." Is that a correct transcription of what your answer was or what you intended to say?

[fol. 2972] A. No, sir.

Q. What did you say, the best of your recollection?

A. "It does make a difference."

The Court: Well, I remembered it the other way; according to my recollection, he said it didn't make any difference after 90 days.

Mr. Waller: Well, he may have said it. I am asking him what he intended to say; I don't know.

The Court: I thought you were saying again that the stenographer's transcript was wrong.

Mr. Waller: Well, that is what Mr. Stengel thought, or else the stenographer is right and Mr. Stengel said something he didn't intend to say, I don't know.

Q. Well, let me ask you again, then, where you say "That is the most we ever asked for," what did you mean by "That is the most we ever asked for"? 60 or 90 days?

The Court: He evidently meant he never asked for clearance of more than ninety days.

[fol. 2973] Mr. Waller:

Q. You didn't mean to say that there wouldn't be any difference between 90 days clearance and three or four months clearance, did you, Mr. Stengel?

The Court: I remember the testimony very well. What I thought he had in mind from the testimony that he gave was that after a clearance of 90 days, if you have a clearance of ninety days, that then any further showing of that picture on any other run wouldn't make any particular difference.

Mr. Waller:

Q. Well, was that what you intended to say or did say, to the best of your recollection?

A. To the best of my recollection, I said "It does make a difference for we don't ask for any more." And I would not have said, "but we don't ask for any more," if I had said "it doesn't make any difference."

Q. In other words, you would not have used the words "but" or phrase "And that is the most we ever ask for"? That is your recollection?

A. That is correct.

The Court: Well, I don't think it makes a great deal of difference.

[fol. 2974] Mr. Waller: I don't think it makes a great deal of difference either, your Honor.

Q. I failed to ask you about whether or not you ever authorized Mr. Castleberry, Mr. Gorman or Mr. Hendren, or anybody else, to say to any independent exhibitor, or to any one else, that an independent would not be able, or would not be permitted to get pictures if Crescent or Rockwood or one of the other independent exhibitors opened a theater in the town?

Mr. Wright: I except; I think that is a conclusion to be drawn from all the evidence.

The Court: I sustain the objection; he would necessarily have to authorize him to do it.

Mr. Waller:

Q. Well, did that ever come to your attention, Mr. Stengel, before this suit was instituted by the Government, that anybody had ever claimed that any of those three men had ever made such a statement to any independent exhibitor?

A. No.

Q. In any town where Crescent Amusement Company or Rockwood were negotiating for the purchase of a theater [fol. 2975] or thinking about building a theater?

A. No; to the best of my recollection, that did not happen.

Q. Did you ever hear it claimed that it happened before this lawsuit?

Q. Yes, sir; I heard it claimed once by an FBI man, about two years ago.

Q. Well, aside from that, did you ever hear it claimed?
A. No, sir.
Q. So far as you knew or were informed, had any such statement been made by any of these men or by any one else purporting to represent any company with which you were connected?
A. No, sir.

Mr. Wright: I didn't catch the last question.

(Question and answer read by reporter.)

Mr. Waller:

Q. Now, as I understand it, you have nothing to do, and never have had anything to do with negotiating films for Muscle Shoals Theaters or Cumberland Amusement Company, is that correct?
A. That is correct.
Q. Among others?
[fol. 2976] A. That is correct.
Q. And in your negotiations for film contracts on behalf of Crescent and on behalf of Rockwood and its affiliates have you ever made a threat or suggestion to any representative of any film company that if you couldn't get his films for some particular town, you wouldn't buy them for other towns?
A. I have not.
Q. As a matter of fact, as far as Rockwood and affiliates are concerned, have you ever made a film deal, or negotiated for a film deal at a time when there was any competition in any of those towns, with the exception of Tim Smith in Newport?
A. I don't believe so; I might have made a deal, while the Empress Theater was still open in Central City; that is about the only one I can remember of.
Q. Now, you testified that when the Newport Amusements, Inc., took over the Windston theater in Newport, Tennessee, where Mr. Baird had been previously making contract, you found that in comparison, particularly with the Parrott and Hendren contracts, that Mr. Baird had good contracts, is that right?
A. Generally speaking, yes, he made good film contracts.
[fol. 2977] Q. I believe you have had submitted to you these playoff sheets, or have had submitted to you these

playoff sheets of Fox, showing the three year franchise with Mr. Baird, the contract Baird had with Fox at the time Newport Amusements Inc., was formed?

A. Yes, sir, I have seen that.

Mr. Waller: We offer these three sheets covering the three year period of the Fox franchise with Mr. Baird, at the Empress theatre—well as defendants' general exhibit number 220.

The Court: What are they, Baird's play-off sheets for Fox's three year contract, prior to the sale?

Mr. Waller: One is after the sale, the others before the sale.

The Court: That would be competent, what is the purpose of the other two?

Mr. Waller: That the play-off is according to the contract made by Baird himself—a three year contract. As I understand the Government has introduced the play-off [fol. 2978] sheets of Parrott and Hendren to show that Cherokee got better deals that when Cherokee was formed, that Cherokee got better film deals than Parrott and Hendren were able to get. We want to show that that is not universal. We say it might have been due to personalities,

Mr. Wright: I do not see where the Parrott and Hendren situation has anything to do with the Newport, Baird situation.

Mr. Waller: We don't think so, I think he is trying to draw a general rule from one situation, and we are trying to show that the general rule can not be drawn from one situation, because here is another case where the independent did have a good contract.

The Court: All right, let it be admitted.

Mr. Waller:

Q. I notice, Mr. Stengel, that on the last year of that Fox franchise, that Mr. Baird negotiated, there is a picture, JESSE JAMES, which was played on a percentage; what sort of a picture was JESSE JAMES in a town like Newport, Ten- [fol. 2979] nessee, as compared with an average run of picture?

A. Through this entire section it was probably the outstanding picture that has been exhibited other than GONE WITH THE WIND, in every town and hamlet; it has played

back at least one time, and in many cases three and four times. It grossed a phenomenal amount of money.

Q. I show you cut off on the K-7 deal, Fox Film Corporation, referring to Newport, Tennessee, and will ask you if this shows the playoff the first year of the new franchise, which was negotiated by you?

A. Yes, sir.

Mr. Waller: We offer that as defendant's exhibit number 221.

Mr. Wright: May I ask what that is supposed to show, as compared with the figures?

Mr. Waller: Let me ask Mr. Stengel?

A. Yes, sir.

Q. In order to clear up the purpose for which the offer is made, when you negotiated for the new Fox franchise, covering the town of Newport, what was the basis of the negotiations, and what was said and done between you and the Fox representative with reference to the town of Newport?

[fol. 2980] A. We tried to buy the pictures for less than Mr. Baird had been paying for them. We finally ended up by paying or agreeing to pay what the pictures had earned —on what the pictures had got out of the town the previous year.

Q. You mean on a percentage basis?

A. That is correct.

Q. Was it Jesse James?

A. I don't think it was.

The Court: What was that?

A. The first deal was a percentage deal, and then the flat rental, and in order to arrive at that, it had to be based on what they did the year before.

Mr. Wright: If Fox had an experience on what they were able to do in Newport, and he was not making as good a deal on the flat rental as before?

Mr. Waller: That is to show you can get just as good a deal as an independent as if you are a circuit.

The Court: All right you may ask him.

Mr. Wright: No cross-examination. Further deponent saith not.

[fol. 2981] NEIL AGNEW, called as a witness in behalf of Defendant, he having been first duly sworn, testified as follows:

Direct examination.

By Mr. Waller, for Defendants:

Q. Mr. Agnew with what corporation are you connected and in what capacity?

A. Paramount Pictures Corporation, I am Vice-President in charge of sales.

Q. How long have you held that position?

A. Since June of 1934.

Q. Will you state briefly the nature of your duties and authority in that capacity?

A. Well, I supervise the sales domestically in the United States and Canada of Paramount's motion pictures.

Q. Do you know Mr. Charles M. Ragan?

A. Yes.

Q. What connection does he have with the corporation and what connection did he have in September, 1935?

A. At present he is Assistant Sales Manager, and in 1935 he was Divisional Sales Manager for the Western territory.

Q. Now, what did the Western territory include?

A. The territory including, roughly, Detroit, and West of the Mississippi River—Chicago and West of there.

Q. Well, did it include the Atlanta Exchange territory?

[fol. 2982] A. No.

Q. And did he have anything to do with deals with the Crescent Amusement Company?

A. At that time?

Q. Yes?

A. No.

Q. As between closely neighboring towns in a rural community, where each town desires clearance over the other town, what determines that question; in other words, what determines the question whether Paramount will give clearance to the one town or the other?

A. Well, generally, clearances are established by priority of run going to the town or the situation that gives the most revenue—or the greatest amount of film rental.

Q. Do you undertake to set the towns up so as to get the greatest aggregate revenue from the two or more situations involved?

A. That is the desirable thing, yes, sir.

Q. Now, does the character and size of the theaters and the population of the towns have anything to do with it; are they factors to be considered?

A. They all are, yes.

Q. What was Mr. J. T. Howard's position in September, 1935?

[fol. 2983] A. Manager, I believe, of the Indianapolis Branch—our Indianapolis Exchange.

Q. Since you have come to Nashville to testify in this case, have you seen a letter from Mr. Howard to Mr. Ragan, dated September 20th, 1935, which is Government Exhibit 160 in this case, and the reply of Mr. Ragan to Mr. Howard dated September 24, 1935, which is Government Exhibit 96, both relating to Earlington, Kentucky?

A. Yes, I have seen copies of both of those letters.

Q. Was the question involved in that correspondence referred to you in any way at the time the matter came up, or do you recall?

A. Not that I recall, no.

Mr. Waller: The letter I have reference to is a letter in which Mr. Howard wrote to Mr. Ragan, in effect, that it would be rather an injustice to allow Madisonville clearance over Earlington, and Mr. Ragan's reply, does your Honor remember those letters?

The Court: Yes.

Mr. Waller:

Q. Assuming that it had been Mr. Ragan's opinion that if Madisonville had not been included in a circuit deal with [fol. 2984] the Sudekum circuit, Madisonville would not have been entitled to clearance priority run over Earlington, was that also your——

Mr. Wright: If your Honor please, he has already testified that the matter wasn't taken up with him. Now, I don't see how it would be competent for him to say what—There isn't any showing, first, that he ever had any opinion on the subject, and that he has ever been impressed with an idea that could be the basis of an opinion.

Mr. Waller: He was executive officer over Mr. Ragan at that time, Your Honor; I want to develop it.

The Court: I can't see how that would be competent; in the first place, you are assuming the opinion of one person

in the case and then asking whether or not that would have been his opinion. What difference does that make? It is not a question of what his opinion would have been; it is a question of what happened in this case.

Mr. Waller: If I understand the letter that has been in-
[fol. 2985] troduced, the Government contends that the letter sets forth Mr. Ragan's opinion.

The Court: Well, read the letter.

(Mr. Waller reads the Exhibit referred to.)

The Court: You might ask him if he approved Mr. Ragan's position in that matter as an official of the company, according to its policy?

Mr. Waller: I believe he stated he didn't recall it having been brought to his attention.

The Court: Well, you can ask him if he approves of it now.

Mr. Waller:

Q. Yes, Do you approve of it now?

Mr. Wright: I don't see how that is competent now.

The Court: Let's see what his idea is about it.

A. I am afraid not; I think I might have to disagree with that.

[fol. 2986] Q. Now, why?

A. Well to be consistent on the basis that Madisonville no matter who owned it and operated it, it was a larger situation than the other town, what is it, Earlington; and therefore probably capable of yielding more film rental than Earlington.

Q. Did you take into consideration the facts proven——

The Court: Well I do not see that an official can come in now after this case has already been filed and being tried to try to show now that he does not approve of what was actually the policy of the company at that time.

Mr. Waller: I want to prove that was not the policy.

Mr. Wright: Well that doesn't prove it, that it was not the policy, say you have to prove it, you have to prove what was done, or what was done would not have been approved.

Mr. Waller:

Q. Did Mr. Ragan have anything to do with approving a circuit deal with the Sudekum Circuit in 1935?

A. No.

Q. Was the Indianapolis office under his jurisdiction?
[fol. 2987] A. Yes, it was.

Q. But not the Atlanta Exchange?

A. That is right.

Q. Was Earlington a town that was naturally in the Indianapolis exchange territory?

A. It was served out of Indianapolis, and I presume it would naturally belong there.

Q. Had Madisonville been transferred to the Atlanta exchange?

A. I understand so.

Q. Where a question of clearance is involved, is it usual for a branch manager to serve a theatre served out of his exchange, to favor a theatre served out of his exchange over one that was not served out of his exchange? From another exchange?

A. Well he sometimes shows a greater interest in his own territory, naturally takes up for his own exchange, more so than he would for a town across the border, or another town.

Q. What would be the reason for that?

Mr. Wright: Here we are, getting into a lot of speculation the reason for some action that is five years later, from somebody that had nothing to do with the action that was [fol. 2988] taken, I do not see that question can possibly be competent.

Mr. Waller: I proved also that Mr. Regan, who wrote the letter had nothing to do with the action, Your Honor, and I am trying to show where there are two exchange territories, there are reasons why the Branch Manager in one exchange might champion his own exchange.

The Court: I can see why it would be to his interest of course.

Mr. Waller: That was all I was trying to show.

The Court: Of course.

Mr. Waller:

Q. Now, Mr. Agnew, were you familiar with the negotiations which led up to and culminated in the five year franchise between the Paramount and Crescent Amusement Company for the 1937-38 season?

A. I was familiar with the fact that negotiations were on, not with their details, the facts, of those negotiations.

Q. Did you recommend the franchise to the board of directors of your corporation?

[fol. 2989] A. Yes.

Q. Now why was it that Paramount desired to or was willing to enter into a five year franchise with the Crescent Amusement Company?

A. Well our income from the circuit, from the territory involved, had been rather unsatisfactory. Either we had not sold the Sudekum Circuit for some odd years, or when we did we were not represented entirely rightly, as to terms, numbers of pictures, et cetera, so naturally I was interested in any kind of a franchise that would bring in consistent revenue from those theatres to Paramount.

Q. Well, was a lease of the Paramount theatre in Nashville involved in any way in the transaction?

A. Yes, sir, we made a franchise which ran concurrently with the lease on the theatre to Mr. Sudekum.

Q. Was there any reason that appealed to you as Vice-President of Paramount for making the franchise co-extensive with the lease?

A. Yes. I felt that it was a proper thing to do in the interest of Paramount, the gentlemen who were operating the theatre was an important factor in the Paramount chain of theatres, and I wanted to be sure that that advantage accrued to us as a partner of his in the operation, that [fol. 2990] we should have the film rental deal which ran along with the operating lease of the theatre, so that our interests were more closely knit together.

Q. Now aside from the proposition of the theatre and the proposition that you had been left out, or had not been getting said revenue from the Crescent Amusement Company in your experience is there any difference from the standpoint of box office appeal of Paramount pictures where the pictures are played more or less continuously in a theatre or a group of theatres, or over a group of years, as compared with the situation where those pictures are played one a year or not played that often?

A. Not played the next?

Q. And not played the next, played one year and not the next?

A. Of course there is a difference in favor of the consistently played programme, with the advertising of the stars, personalities, *sieuxrroea, wrx*, has a cumulative value which does not accrue when they are played erratically.

For example, Paramount Pictures played in a Paramount theatre where they are played regularly over the years, are better than comperable theatres or in other theaters, we will say, or in less comperable theatres, where they are played not continuously every year.

Q. Every year?

[fol. 2991] *Q. Every year?*

A. Generally I would say I have noticed in theatres that play any major program consistently and have a greater interest in that program, they are building better, develop better grosses, than in those pictures and those theatres that are interested in playing not all the pictures.

Q. What about selling on a long deal, in comparison with a short deal?

A. It is a fact I would say too, and it is a factor.

Q. Mr. Agnew, is it to the advantage or disadvantage of Paramount as the distributor of motion pictures to have competition amongst the exhibitors?

A. Of course.

Q. Is which?

A. It is an advantage.

Q. It is an advantage?

A. Yes.

Q. What sort of competition do you have reference to? Is there more than one kind of competition?

A. I mean substantial competition as compared with less substantial competition?

A. And again healthy competition, good healthy competition is good, yes, naturally.

Q. You regard that as an advantage.

[fol. 2992] Q. You regard that as an advantage to Paramount?

A. And the industry.

Q. Now in referring to the Paramount franchise that has been referred to as being one with Crescent, and the one with Rockwood and Affiliates, was it your purpose in making those franchises or was it one of your purposes, to prevent competition, to prevent competitors of Crescent and Rockwood from obtaining films and being able to compete with Crescent and Rockwood?

A. Naturally we could not sell them the same run, but it was not the purpose to execute subsequent leases, is that the question?

Q. Yes—was it the purpose and intention of Paramount to suppress competition of independents with Crescent?

A. No.

Q. Are you familiar with the phrase repeat run as used in the motion picture industry?

A. Yes.

Q. Are you familiar with the phrase second run as used in the motion picture industry?

A. I am.

Q. Will you explain the meanings of those phrases? I will let you explain the meanings of those phrases and compare them?

[fol. 2993] A. Well a repeat run could be any other run following the first run picture, it is rather a broad term that can be applied to a picture after the first run is already played, playing it again, that is the term repeat run, naturally. Certain theatres are in the category of repeat runs generally interpreted today I think to mean with reference to certain pictures consistently have a regular program second run is exactly what it says, second run, the run that follows the first run.

[fol. 2994] Q. Now, can the phrase "second run" be used in more than one sense, that is, with reference to whether it is a different theatre or the same theatre?

A. Yes, it can be used in both senses.

Q. Mr. Agnew, is it a practice for office memoranda, on spot booking, for forms to be made up in the branch offices of Paramount where pictures are sold which are not included in any definite written contract, or which are not sold pursuant to any definite written contract?

A. Well, it is is a requirement to support every dealing of pictures with a memorandum contract.

Q. Why is that?

A. A part of the routine operation.

Q. Simply an accounting proposition?

A. It is required for the home office, yes.

Q. In a situation where Paramount has the first run account in a town and there are two second run houses, each of which wants a second run contract, what determines whether Paramount will prefer the one or the other second run house? In other words, what considerations do you take into account in such a situation?

A. What is the distinction between the two second run houses?

Q. One of the second run houses is owned and operated by your first run account, and the other is a competitor?

[fol. 2995] A. Generally, we prefer to sell the second run to the man who plays the pictures first run: advertising advantages particularly we feel that a man who was interested in the operation of both won't seek to injure his first run by a policy which the other man might or might not be so considerate about. Then, there is the advantage of advertising; we feel that as long as a man operates first run, if he is to repeat the picture in a second run house, will perhaps go a little further in advertising that picture or the program itself. That is not without exception, but that is the general policy.

Q. In a relatively small town, under 10,000 population, where there are competing theatres, where Paramount has a first run deal with one of those theatres, would you ordinarily be willing to sell the competitor only a few of top-notch pictures to play second run in the competing house?

A. No generally, it would be desirable, if those pictures are to be repeated, to sell them to the man who played them first run.

Q. Is that for the same reason you just explained?

A. Generally so.

Q. If you want to sell a second run account or second run deal, do you insist on more than a few pictures in such a situation?

A. Yes. If we elected to sell him at all, in a small town.

[fol. 2996] Q. From the time you have been connected with Paramount until the present time, have you ever had a conversation or communication of any kind with anyone in regard to preventing competitors of the Crescent Amusement Company, or any of the other defendant Exhibitors in this case, from obtaining pictures?

A. No sir.

Q. Have you ever had an understanding or agreement of any kind with any of the defendant Exhibitors, as to preventing competitors from obtaining pictures or choice pictures?

A. No.

The Court: Other than the contracts show.

A. None whatever.

Mr. Waller:

Q. Have you ever had a contract with any of the defendant Exhibitors which had any purpose other than the normal and usual licensing of pictures to the exhibitor for the actual exhibition in their theatres?

A. Not to my knowledge.

Q. Have you ever included in any of those contracts any provision as to clearance which had any purpose or intent other than to protect the value of the copyright to both licensor and licensee in the usual and normal way?

A. Not to my knowledge.

[fol. 2997] Q. Have you ever approved a contract or franchise between Paramount and any of the defendant Exhibitors in this case, with the knowledge or suspicion that any purpose of it was to suppress competition of any exhibitors who were competing with these defendant exhibitors?

A. None.

By Mr. Raftery:

Q. How long have you been in this business?

A. Mr. Raftery, about twenty-one years, I should say.

Q. How long?

A. About twenty-one years.

Q. Can you cite me an example now of a town where you sold to both towns, an eight thousand population town and a three thousand population town, where you sold clearance to the 3,000 population town over the 8,000 population town?

A. No, I know of none.

Q. You have heard the term "shotgun theatres"?

A. I have been in some of them.

Q. If you had a shotgun theatre, in a competitive situation, as against a regular theatre, which theatre would you prefer to sell Paramount pictures to?

A. To the better theatre.

Q. Do you ever like to have your pictures shown in a shotgun theatre?

[fol. 2998] A. No.

Q. On any run?

A. No sir.

Q. Your preference is not to?

A. Naturally.

Q. You spoke something about competition. Has there been destructive competition in the motion picture business in many situations?

A. Not to my knowledge.

Q. Have you heard the term over-seating?

A. Yes.

Q. What does over-seating mean?

A. The term simply means when there are too many chairs, too many seats profitably to operate in the town.

Q. What generally happens, when you have over-seating, to the distributor?

A. His film rental usually suffers because he has to assume a share of the excess overheads of those theatres.

Q. And the losses of the exhibitor?

A. The same thing.

Q. If there are too many theatres in any competitive situation, what generally happens to the distributor?

A. He loses normal income and besides the assumption of the overheads and part of the losses of the operation.

[fol. 2999] Q. That is when the term adjustment becomes a habit, does it not?

A. That is a chronic adjustment situation, yes.

Q. And it is your chronic headache?

A. Yes.

Cross-examination.

By Mr. Wright:

Q. Mr. Agnew, you referred to the desirability of good clean, healthy competition. Can you point out to me where any such condition, that competition has existed for the past four or five years, give me an example of what you mean?

A. By competition?

Q. By clean, healthy competition?

A. Yes, I think I can. The competition that exists in Atlanta between Fox and Paramount Theatres and Loews Theatres and all the others in the neighborhood.

Q. Can you give me an example of such competition in Tennessee?

A. Well, I am not familiar with the situation in Tennessee with respect to any one town.

Q. Are you familiar with the situation as to the Sudekum [fol. 3000] circuit?

A. I don't know.

Q. Do you know whether there is any competition in that circuit or not?

A. I understand there is, but I am not familiar with the details of it.

Q. You don't know where it is or what kind of competition?

A. I don't know, I have not been in the Sudekum towns, I am not familiar sufficiently to express an opinion.

[fol. 3001] Q. So that any remarks you have made here have been directed entirely to situations other than those in which the Sudekum Circuit is involved?

A. I can't speak of the Sudekum Circuit because I am not familiar with the towns.

Q. Now, I think Mr. Raftery asked you about selling new theatres as against old theatres.

Mr. Raftery: I never mentioned it. I never mentioned it. I said a shotgun theatre against a regular theatre.

The Court: He said an up to date theatre.

Mr. Raftery: They both might be old.

By Mr. Wright:

Q. Can you give us your distinction of a shotgun theatre, as you use the term, Mr. Agnew?

A. Well, again it is a broad term. It means, of course, a less desirable theatre in the industry. I think a good example would be a small, frame theatre, a fire trap and an unsanitary theatre.

Q. Is it purely a comparative term depending on the local situation?

A. No, only to a degree.

Q. Well, in any event, where you have one theatre that is better than another one the respective merits of the [fol. 3002] theatres as pieces of physical equipment necessarily determines which theatre you sell your pictures to?

A. It is a factor.

Q. Only one of a great many?

A. It is a very important factor.

Q. Frequently in making deals you sell your pictures to theatres which are, or to a theatre which may not be as good from a physical standpoint as another theatre?

A. Sometimes but infrequently.

Q. Did you ever hear of the old customer theory?

A. I have heard of old customers but I never heard it referred to as a theory, no.

Q. Is that also one of the factors which determines where you place your product, whether you have an old customer that has been using it, or not?

A. Yes, that is an important factor.

Q. Now, I believe you stated in deciding which town was to have clearance over another you would ordinarily give the clearance to the town which produced the most revenue?

A. That is right.

Q. Now, there is one clearance situation involved here that was taken up with you specifically and I believe that was the situation of Huntingdon and McKenzie. Do you recall that?

A. No.

Q. You don't recall Mr. Morgan having discussed with you the fact that the exhibitor at McKenzie, Tennessee was [fol. 3003] complaining bitterly because you, Paramount, had given Huntingdon clearance over McKenzie when you made the franchise, when you had formerly given McKenzie clearance over Huntingdon?

A. No, I don't believe I recall the names of the towns.

Q. You don't remember that ever having come up?

A. Not at all, no. It might have but I don't recall any part of it.

Q. Well, if it did come up, of course, the first thing you would do would be to look at the relative revenue produced by the towns, is that right?

A. That would be one of the first things, yes, of course.

Q. And if it appeared that in the year preceding the switch in clearance McKenzie had paid your company film revenue that was almost twice as great as that you got from Huntingdon, why, your natural inclination would be not to disturb the clearance, is that right?

A. Depending on the potential income from the other town. In other words, not necessarily. We might have a situation where we did get more income from one situation than another but by reversing them we could bring about a more satisfactory situation. That could happen. I don't know about this particular situation.

Q. You don't remember what happened there at all or why you finally agreed to the change?

A. No, I don't recall its ever having been discussed with me.

Q. How did you happen to be familiar with the situation in Earlington and Madisonville?

[fol. 3004] A. I wasn't until it was discussed here in Nashville.

Q. Down here before you testified?

A. Yes sir.

Q. Your attention wasn't called then to the Huntingdon-McKenzie situation at all?

A. No.

Q. Now, you say Mr. Ragan is now your assistant; he is assistant to the salesmanager?

A. Mr. Ragan, yes.

Q. And that represents a promotion, does it not, over the job he had when he was western district manager?

A. It does.

Q. Western division manager. And you didn't mean to give the impression, did you, that when Mr. Ragan wrote the letter that is in evidence here he didn't know anything about it or wasn't familiar with the Sudekum negotiations, did you?

A. O, no. I didn't say that, I am sure.

Q. And inasmuch as they affected part of his territory he necessarily was advised of what was going on there?

A. Yes sir.

Q. When was the first time, Mr. Agnew, that the repeat run option in the franchise that was made with the Sudekum Circuit now in effect was called to your attention?

A. I am not sure about that but I should say in connection with this trial. I don't think it ever came to my attention previously.

Q. Well, how long ago was that—within the last few [fol. 3005] weeks, you mean?

A. Yes.

Q. Never discussed with you at any time before that?

A. If I have I don't remember it. I think not.

Q. And you undertook to define a repeat run and a second run. Now, it is a fact, isn't it, that under certain circumstances they may mean the same thing—where the repeat run is the second run in a town it is a second run?

A. It could be, but usually referred to though specifically as the second run.

Q. It may be the second run?

A. Yes sir.

By the Court:

Q. Let me ask you this, if this difference exists; in a second run there is a definite obligation to play a certain number of films on the part of the exhibitor, whereas in a repeat run there is no definite obligation but the exhibitor merely has the right if he chooses to exercise it, is that right?

A. Generally so, your Honor. I think more and more in the last two or three years repeat runs have come to mean specific pictures. Previous to that a repeat run was just what it says, any run after the first run. It is a loose term but I should say today we generally, film men referring to a repeat run would mean repeat run on certain pictures.

Q. Where the exhibitor has the right to choose the pictures?

A. Not necessarily.

[fol. 3006] By Mr. Wright:

Q. Well, in any event, where a repeat was incorporated in an option the particular pictures that could be played would be determined by the terms of the particular option in which it was incorporated, is that right?

A. Yes sir, that is right.

Q. Do you recall when it was that you submitted this Sudekum franchise to your directors for approval?

[fol. 3007] A. Will you please repeat the question?

Q. I said, do you recall when it was you submitted the Sudekum franchise to your directors for approval?

A. In 1935, I should venture to say—No, in 1936; some time in the fall of 1936, I believe.

Q. Well, the franchise, or rather, putting in the three documents—they are all one, I believe—covering Crescent, Rockwood, all dated in July, 1938, as of November 20th, 1937.

A. Well, that is a record, and it speaks for itself.

Q. Well, I was just wondering. Well, was it submitted in 1938 or 1937?

A. I would say in the fall of 1937, it seems to me; at some time in the beginning of the theatrical season 1937, I suppose.

Q. In any event, at the time it was finally approved, in 1938, it had been your policy to discourage the making of franchises generally, isn't that right?

A. Discourage the making of franchises?

Q. Yes?

A. We didn't make many franchises in the past few years; I will say in six years or so, we haven't encouraged the making of franchises because we didn't feel, and don't feel, that they are to our advantage.

[fol. 3008] Q. And this Sudekum deal here was an exception to the general policy?

A. We haven't got a policy with respect to that; we analyze the situation on its own; but in this case we thought it was desirable, of course.

Q. But the general policy you were pursuing at that time was to discourage the making of franchises, was it not?

A. I don't think that is quite correct. We encouraged the making of certain franchises, but they were few. As a general thing we don't make franchises, and we haven't been making them for some years past, with a few exceptions.

Q. Well, why was it that you don't ordinarily make any franchises?

A. Well, for the reason that we are unable to forecast the terms, and the economic conditions, particularly in our business, changes have come about in the past few years; our pictures have been reduced from 32 pictures to, this year 8. We don't know what the pictures are going to cost us, or how many there will be in the deals we are making, and it is very difficult to establish the terms; that is the basic reason we don't make franchises.

Q. Isn't it also true that it is a basic arrangement that you regard it as a one-sided arrangement favoring the exhibitor.

[fol. 3009] A. No, we don't feel it is a one-sided arrangement favoring the exhibitor, or we wouldn't make them.

Q. Do you remember giving testimony, Mr. Agnew, in the form of a deposition that was taken on March 27, 1940, in the case of the United States against Paramount Pictures?

A. I don't remember the date; I remember giving the deposition.

Q. I will read you some of the questions and answers and ask you if you recall having given those as your testimony; at page 1524——

Mr. Waller: Is this for the purpose of contradicting the witness?

Mr. Wright: It is just to refresh his recollection.

Mr. Waller: We object to it, unless it is to contradict what he has stated on the witness-stand. What he has stated in another case wouldn't have anything to do with this case.

The Court: It might have a whole lot to do with it. Let's see what it is.

[fol. 3010] Mr. Wright: (Reading):

"Q. Have you more or less franchises in effect today than you had ten years ago?

A. I should say less. As a general rule I discourage the making of franchises.

Q. That was when you became general sales manager?

A. And for a long time before that.

Q. And why is that?

A. Because I don't think you can adequately forecast the quality of pictures or economic conditions sufficiently to be able to write an equitable franchise. And I don't like a franchise that does not carry the terms. I think it is a one-sided arrangement."

The Court: Franchise what?

Mr. Wright: "Franchise that does not carry the terms." (Reading further:)

"Q. One sided in whose favor?

A. In favor of the exhibitor.

Q. Well, that depends pretty much on the terms of the franchise, doesn't it?

A. Well, I said a franchise that doesn't carry the terms is a one-sided agreement. Franchises have been [fol. 3011] made without terms—terms negotiable or to be arbitrated."

Q. That is exactly the type of franchise you have here for the first run and subsequent run, as far as in Nashville, is that right?

Mr. Raftery: Objected to; Nashville is not involved.

The Court: Sustained.

Mr. Wright: In the franchises made here each one is made subject to the performance of the Nashville franchise; the Rockwood and Crescent franchises must also stay in effect; it is all made a part of one deal.

Mr. Raftery: If your Honor please, the Court excluded Nashville for obvious reasons. In that theater United Artists, Metro and Columbia products are shown; not a stick is shown in these other theaters. So we object to that.

Mr. Waller: There is no issue in this case as to franchises without terms. The franchise in this case, in regard to these towns does have very definite and specific terms; and what Mr. Wright has been reading is a very different proposition.

[fol. 3012] Mr. Wright: (Reading:)

"Q. Simply giving the exhibitor the first call of pictures?

A. That is right. As a distributor I think that is a one-way street.

Q. Well, has your policy been there since you have been general sales manager, merely to discourage the making of franchises without rental terms or to discourage the making of franchises generally?

A. I discourage both kinds.

Q. And what is the reason for discouraging the making of franchises which contain rental terms?

A. The reason is that the exhibitor, if he thinks he is hurt, can always come in and complain and ask for adjustments. If you are hurt, he doesn't tell you about it."

Q. Do you recall that?

A. I recall that very distinctly, and in effect I would like to repeat it here again; those are my views now.

Q. You were willing to make the franchise with the Sudekum circuit because of what you regarded as exceptional circumstances with the company at that date?

A. Certainly; exactly.

Q. Now, Mr. Raftery, I believe, asked you if you could [fol. 3013] name any towns which were smaller than another, which was a town of 3,000 which took clearance over a town of 9037——

Mr. Raftery: No, that is not accurate. Repeat it just as it was: Mr. Agnew, can you name a town in your 20 years experience in this business, where you sold both situations,

a town of 3,000 and a town of 8,000, where you sold clearance in the 3,000 over the 8,000?

A. I said I didn't recall any situation.

Mr. Wright:

Q. Now, can you recall a town where you sold a town of 3,000 and another of 8,000?

A. Do I recall a situation where we sold a town of 3,000 and a town of 8,000?

Q. Yes, where it is four miles away from it?

A. Not any rural towns that I can recall.

Q. Well, before coming here you didn't make any effort to refresh your recollection as to what you might have done or might not have done in towns of 3,000 and towns of 8,000, isn't that correct?

A. It is not a matter of recollection; it is a matter of procedure and custom; we would sell a town of 8,000 first and if we could sell the town of 3,000 four miles away, we would certainly do it, and following the town of 8,000.

[fol. 3014] Q. I will repeat the question: Can you give me an example of two towns which you sell where one is 8,000 and one is 3,000 and they are both close together, out of your experience?

A. I don't recall any rural situations like that; many suburban towns, but I don't think we sold——

Q. If you had made a study of that particular franchise situation, you could undoubtedly find a number of situations, could you not, where you give a smaller town clearance over a larger town, is that right?

A. I haven't.

Q. Well, do you know of this situation, where Paramount has a house that takes clearance over much larger towns, in Maine?

Mr. Raftery: Paramount in its own theater contract?

A. No, I do not.

Mr. Wright

Q. Do you know of that situation?

A. No, none at all.

Q. As a matter of fact, you are not able to testify here at all as to any particular clearance situation that you might have, without reference to what your records show?

A. That is essentially true, yes.

[fol. 3015] Q. Now, Mr. Agnew, will you then tell us if you were general manager, while you then were general salesmanager, the contracts that have been made with Interstate Circuit and Consolidated theaters, the theatres in Texas, have all been approved by you, have they not?

Mr. Armistead: I do not see, may it please the Court, what that has to do with the issues involved in this case. That case has been disposed of in the Interstate case, I do not understand the purpose of the question at all.

Mr. Wright: I think if we get an answer it will clarify it?

A. I will be glad to answer that for you, the Interstate Circuit and Consolidated and others, has a franchise with us for our pictures where they are in that circuit, the Paramount did not have yearly deals. The terms are sometimes determined after the picture is played.

Mr. Wright:

Q. Then the deals were made in 1935 and 1936, under discussion, did you approve them, they were approved by you, were they not?

Mr. Raftery: That is objected to. Mr. Agnew has just testified as to the Interstate Circuit and the Paramount, and [fol. 3016] the Paramount Partners have been given God's blessing in the consent decree by the same Mr. Wright, and I am objecting to any questions about it.

Mr. Wright: And the United Artists were interested in it as you all.

Mr. Raftery: We say this is part of the conspiracy of the Government and the Big Five to get us in, and we object to it.

Mr. Waller: That has nothing to do with this case.

Mr. Wright: That is what I thought, if he had ever participated in any agreement, and it was a rather swe-ping question, that did not have much place in the case.

. . . . . .

[fol. 3017] The Court: I will sustain the objection. Go ahead.

Mr. Wright: That is all.

Mr. Waller: I would like to have the letter of Mr. Morgan to Mr. Agnew, that was referred to by Government Counsel,

I have asked for that letter referred to by Government counsel, and it was passed to me by Government counsel, but it appears to be Government exhibit number——

Mr. Wright: It is a letter from Mr. Morgan to Mr. Unger, which refers to a letter written by Mr. Moore to Mr. Agnew. That letter we did not have the original, Paramount was asked to produce the original.

Mr. Waller: This letter is to Mr. Unger, not to Mr. Agnew.

Mr. Wright: The letter to Mr. Agnew was from Mr. Moore.

Mr. Waller:

Q. Mr. Agnew, where there is no clearance at all set out in the contracts relating to neighboring towns, is it necessary for the distributor to arrange and to make an arrange-
[fol. 3018] ment as between those towns?

A. Well proper routing of the print is involved normally in that question, I said we would sell the larger town, or we would play the larger town first.

Q. In other words, the same principle applies where there is no clearance set out in the contracts?

A. Generally so, yes.

Q. And then a distributor such as Paramount generally prefers that there be no clearance in such a situation?

A. And they set up their own booking arrangements.

Q. Set up their own booking arrangements?

A. That is generally so, yes.

Q. Where there are two towns and each one is demanding clearance over the other, then do you have to decide that question?

A. You do.

Q. By taking into consideration the pictures and the bookings?

A. That is right.

Q. Is there a difference between a repeat run or repeat run unless there is a repeat run clause in the contract—in other words, a repeat run is simply a phrase put in the contract, is that correct?

[fol. 3019] The Court: Well, what this court is concerned with repeat run, is repeat run expressed in these contracts.

Mr. Waller:

Q. You can have a contract about a repeat run?

A. Yes.

Q. You were asked about a franchise in general the fact that Paramount has made a number of franchises with theatre owners, having one or two theatres?

A. Yes, s-.

Q. In the last few years, have you decreased the number of those franchises for the reasons given Mr. Wright?

A. I think not. You see that the old franchise holders had been able to renew their franchises.

Q. Well, in any event, have you changed your policy for the reason given to Mr. Wright?

A. We have not denied any of the old franchise holders, is all I know.

Q. You have regarded the country as on an economic up-swing, have you not?

A. I do right now.

Q. With rising costs of production and fewer pictures?

A. Those are factors in our reluctance to renew franchises.

Q. And in the case of the Crescent Amusement Company, [fol. 3020] you were the one that wanted the five year term?

A. We did.

The Court: He wanted to make it co-extensive with his lease.

A. Exactly.

Further deponent saith not.

* * * * * * *

[fol. 3021] Mr. Waller: Your Honor, we would like to file some evidence we have, some statistics, documentary evidence, along the line the Government has introduced, and we feel that we should introduce some also. The first exhibit will be defendant's exhibit number 222, which is Fox play-off sheet for Earlington, Kentucky, for 1935-36, and the Fox play-off sheet for Madisonville, Kentucky, for 1936-1937. Your Honor will recall——

The Court: Yes, I recall about it, let it be admitted.

STIPULATIONS RE CERTAIN DOCUMENTARY EVIDENCE

Mr. Waller: Now we have some stipulations in regard to Paramount. These are tabulations, I think we can introduce them as exhibits, they have been submitted to coun-

sel as I understand by Mr. Morgan who is here in behalf of Paramount. The first one is the revenue from Madisonville and Earlington, Kentucky, and the admission price at the two locations for the seasons 1935-36, to 1939-40, inclusive, that will be defendants' exhibit No. 223.

The next one is the Paramount film rentals received in [fol. 3022] Hopkinsville, Kentucky in 1935-36 and by Crescent in 1936-37, from Anderson, 1937-38 from Crescent, both first and second run, and that will be Defendants' Exhibit No. 224.

The next one gives the Paramount film rentals from Brownsville, Tennessee, commencing with the 1934-35 season where Lawing was the exhibitor, and the succeeding five seasons in which Crescent was the exhibitor. That will be Defendants' Exhibit No. 225.

The next one will be a sheet showing the revenue received by Paramount from Columbia, Tennessee, and Mt. Pleasant, Tennessee, Columbia being a Crescent town, and Mt Pleasant the town where Mr. Page operates a theatre, giving the figures for 1932-33 to 1938-39 inclusive, that will be Defendant's Exhibit No. 226.

Next one is the second run contract between Paramount and the Dixie Theatre, East Gadsden, Alabama, dated twelve, twenty-six, thirty-nine, signed by Tex Ruffner as the Exhibitor and F. C. Goodner, salesman. The purpose is to show the contents of that contract, and to show that Mr. Currey, the Government's witness, did not know what he was talking about.

[fol. 3023] Mr. Wright: I do not see how this shows that.

Mr. Waller: Read his testimony, and I think you will see it. That will be a P exhibit I think, Mr. Wasson.

The Court: Go ahead with the defendants' exhibit numbers.

Mr. Waller: That will be Defendant's Exhibit No. 227.

The next one is the second run contract between Paramount and Crescent Amusement Company covering the Princess, Capitol and Gadsden theatres in Gadsden, Alabama.

Mr. Wright: In this first contract introduced, do you know whether it was performed or not?

Mr. Waller: I don't know whether it was performed or not.

Mr. Wright: I think we should find out.

Mr. Waller: I will agree that it was performed.

Mr. Wright: Well if it was not?

The Court: Let it be admitted subject to the objection [fol. 3024] and finding out whether it was performed.

Mr. Waller: I will agree either way that they want it, if they will tell us which way, we will stipulate right now.

The Court: You must be relying on it pretty heavily.

Mr. Waller: It is not introduced for that purpose.

The Court: All right.

Mr. Waller: The next one will be contract between Paramount and Crescent that I have just referred to, covering the following season S-11, dated January 8, 1940. That will be defendant's Exhibit No. 228.

[fol. 3025] Mr. Waller: The next tabulation or next Exhibit I have here is in three parts which I would like to have braded together, showing the revenue of Loew's from the Princess Theatre, "first run," Gadsden, Alabama; Ritz Theatre, Alabama City, with the caption, "second run," and the Dixie Theatre, Gadsden, Alabama, captioned as "Subsequent Run," covering 1938-39, 1939-40 and 1940-41 seasons.

In that connection the proof shows that Crescent had no contract with Loew's for Alabama City for the 1939-40 season, and the contract for the Princess Theatre was made after the end of the playing season. Is that correct, Mr. Wright?

Mr. Wright: That is my understanding. Of course, unlike the other play-off sheets that has been offered, this doesn't show when the pictures that are listed here were released or played at the other theatres, which I think is quite an important element in determining what their value may be.

Mr. Waller: We have no objection to that information being supplied.

[fol. 3026] Mr. Wright: We would like to see that on a regular play-off sheet of Loew's.

Mr. Waller: We didn't make them up. This is the way we are getting ours.

Mr. Wright: What is the purpose, what are they supposed to show?

Mr. Waller: The purpose is to show that the revenue of the Ritz Theatre at Alabama City was substantially more than the revenue from the Dixie Theatre at East Gadsden, Alabama.

Mr. Wright: Considering the fact that the pictures were played earlier at both houses, I can't see that that is particularly strange. I think the play date should appear there to show how much earlier they were played.

Mr. Waller: I think the evidence already shows they were played earlier. We don't dispute that.

The Court: As I understand it, this is a matter of stipulation?

Mr. Wright: Well, I am just looking at it now.

Mr. Waller: If he doesn't want to stipulate that, I will [fol. 3027] get the play dates. There has been no definite agreement about it.

Mr. Wright: We can work that out later.

Mr. Waller: Now, I have 6 of the play-off sheets, copies of which were furnished us. They were filed by Fox, in response to Government Interrogatory, covering 1934-35 1935-36, and 1936-37 seasons at Providence, Kentucky, which was at that time a so-called independent town, in which Mr. Beymer was the exhibitor, and the play-off sheets for the same three seasons at Fayetteville, Tennessee, which was a so-called Crescent town. Providence, Kentucky is a considerably larger town than Fayetteville, Tennessee, but never-the-less gots its pictures much cheaper. The only purpose in offering this is to show there is no such thing, your Honor, as comparable situations, based on populations of towns.

Mr. Wright: I thought when Mr. Waller offered the exhibit, he had come around to the idea that there were comparable situations. If he is not offering them as comparable situations, I don't see that what he is offering is comparable at all.

[fol. 3028] The Court: He is offering them as comparable situations, but comparable from the reverse.

Mr. Wright: Would you mind stating the population of the two towns?

Mr. Waller: Providence, Kentucky is about 4700, and Fayetteville about 4,000. I don't know exactly but the Exhibits will show.

Mr. Wright: This sheet here shows Crescent. Should it not be Cumberland?

Mr. Waller: I think that is wrong. It has got Crescent, but it ought to be Cumberland.

The Court: You had better be sure what it is before you put it in the record.

Mr. Waller: It is the same type the Government put in. I think it should be corrected before it is put in.

The only other evidence we have, I think, we would like to introduce Section IV, and read into the record, Section IV of the Amended and Supplemental Complaint filed by the Government in the Paramount case, in the District Court of the Southern District of New York on November 14, 1940, and headed "Growth of the Defendants", in which——

Mr. Wright: I don't suppose there is any doubt about the Court being judicially able to notice the complaint.

[fol. 3029] Mr. Waller: That is all right, but I want this in the record, copied in, for the purpose of the record. In other words, it shows, your Honor——

The Court: I don't know whether I will take judicial notice of a pleading filed in a case in another district court; I may be able to, I am not sure about that.

Mr. Waller: In any event, you will stipulate it, won't you, Mr. Wright?

The Court: I can take judicial notice of the orders and decrees of another Court.

Mr. Wright: The complaint has been widely circulated and is available to anybody who wants it to look at. I would like to know what the purpose of reading it into the record is, or what is being attempted in the way of proof by it.

Mr. Waller: The purpose is, that the Supreme Court has held that in considering a Sherman Act case, the relative positions of the different units of the industry must be considered and the state of the particular industry which is under examination, and these allegations are pretty full [fol. 3030] as to the theatres operated by these distributors, the pictures distributed by them, the gross assets, the possible gross earnings of these companies and other statistics, which we think would be relevant to be considered by the Court in examining the question of whether or not the Sherman Act has been violated in this case.

The Court: Well, the statements in a pleading of those facts would not necessarily be evidence.

Mr. Waller: I was asking Mr. Wright to stipulate that those facts are approximately correct, the ones which they set forth in such great detail in this complaint, I assume that they are correct.

Mr. Wright: Well, I assume that those facts that are in the complaint are all correct, or were correct at the time

the allegations were made. I don't see, though, what those allegations have to do with the issues in this suit.

Mr. Waller: Will you stipulate, subject to their competency?

Mr. Raftery: May it please the Court, as Counsel for Universal and United Artists, we join in the offer of that complaint, because the plaintiff in that complaint was the plaintiff in this suit, the same party. We offer them as [fol. 3031] admissions of the Plaintiff.

Mr. Waller: I don't know whether that rule applies against the Government or not. I don't want to rely on it. I am asking Mr. Wright to stipulate, subject to exception for materiality; is that correct?

Mr. Wright: You speak of the relative size of the Companies: I would have to look it over before I would stipulate it shows anything, but the relative size of the companies.

Mr. Waller: Except hearing from Mr. Wright on this stipulation, I think we are through.

Here are the population figures for Providence, Kentucky, and Fayetteville, Tennessee: In 1937, Providence had a population of 4,397; Fayetteville, 3,822. By the 1940 census, Providence had a population of 4,742; Fayetteville, 4,684.

That is all, subject to hearing from Mr. Wright on the stipulation.

The Court: All right. Defendants Rest.

Defendants here rested their case.

* * * * * * * *

[fol. 3032] Mr. Waller: What is your answer on the amended and supplemental complaint?

Mr. Wright: With reference to the amended and supplemental complaint, I offered Mr. Waller a choice of one or two stipulations or both. We will stipulate that the Court may take judicial notice of every allegation that is contained in the amended and supplemental complaint that was filed in connection with the suit in New York styled United States vs. Paramount Pictures, Inc. We will also stipulate that all the facts in the complaint are true. We will not make a partial stipulation that those facts that Mr. Waller may wish to use are true.

[fol. 3033] Mr. Raftery: We won't stipulate as to the truth of what is in there, but we will stipulate the first stipulation, as far as the defendants distributors are concerned.

The Court: That I might take judicial notice of the allegations in the complaint? Is that satisfactory?

Mr. Waller: It is not satisfactory but we much prefer that one to the other.

The Court: All right. Let it be admitted.

* * * * * * *

[fol. 3034] [Stamp:] Filed Deft. Exhibit No. 58, J. A. Willingham, Testimony, July 22, 1941. L. B. Ormes, Clerk. By S. E. Wasson, Chief D. C. On motion of Robt. L. Wright, Gov't. Atty., to strike this Exhibit—The Court granted same—Exhibit # 58 stricken. This 7-22-41 8. E. D., C. D. C.

DEFENDANT'S EXHIBIT 58

Brownsville, Tenn., playoff of MGM product as follows:

Southland Theatre—C. G. Lawing (owner)

1932-33 Product	
39 features	676.27
81 short sub.	248.00
17 news reels	42.50
	966.77
1933-34 Product	
40 features	823.80
96 short sub.	286.00
6 news reels	15.00
	1124.80
1934-35 Product	
41 features	765.69
32 trailers	64.00
60 short sub.	202.00
	1086.69

Capitol Theatre—Crescent Amusement Co.

1935-36 Product	
46 features	1021.95
46 trailers	69.00
85 shorts	246.00
104 issues news	260.00
	1596.95
1936-37 Product	
42 features	1002.20
42 trailers	63.00
84 short sub.	193.00
4 reissues	80.00
4 trailers	6.00
104 news reels	260.00
	1604.20
1937-38 Product	
43 features	1084.88
43 trailers	64.50
98 short sub.	236.00
104 news reels	260.00
	1645.38
1938-39 Product	
49 features	1201.17
49 trailers	73.50
87 short sub.	196.00
104 news reels	260.00
	1730.67

[fol. 3035a] Stamp: Filed (1). Dept. Exhibit #136. Paul S. Wilson—Testimony. Aug. 21, 1941. L. B. Ormes, Clerk. By, L. E. Wasson, Chief, D. [redacted]

DEFENDANT'S EXHIBIT 136

Independent Theatres

The following list covers towns where franchises have been sold—

Town	Theatre	Exhibitor	Period Covered
Albany, Ga.	Albany	A. C. Gortatowsky	1936-37 1937-38 1938-39 1939-40 1940-41 1941-42
Scottsboro, Ala.	Bocanita	J. A. Snodgrass	1936-37 1937-38 1938-39 1939-40 1940-41 1941-42 1942-43
Monticello, Fla.	Katherine	Katherine Johnson	1938-39 1939-40 1940-41
Alexander City, Ala.	Strand	Mack Jackson	1937-38 1938-39 1939-40
Carrollton, Ga.	Carroll	Carrollton Theatre Co. (Oscar Oldknow)	1936-37 1937-38 1938-39
Claxton, Ga.	Italian Garden	S. G. Tos	1937-38 1938-39 1939-40
Commerce, Ga.	Roxy	Mrs. P. M. Wise	1936-37 1937-38 1938-39
Cordele, Ga.	Woods	Frank J. Wood	1937-38 1938-39
Covington, Ga.	Strand	Mrs. M. Osman	1936-37 1937-38 1938-39
Chattanooga, Tenn.	Grand Amuse.	M. Lebovitz	1938-39 1939-40
Cullman, Ala.	Strand	Wm. R. Griffin	1936-37 1937-38 1938-39
Fernandina, Fla.	Ritz	Mrs. D. B. White	1937-38 1938-39 1939-40
Gallatin, Tenn.	Palace	W. F. Roth, Jr.	1936-37 1937-38 1938-39
Hartwell, Ga.	Emily	Mrs. W. T. Yarbrough	1936-37 1937-38 1938-39
Wrightsville, Ga.	Dixie	Dixie Amusement Co.	1937-38 1938-39
Jackson, Ga.	Dixie		1937-38 1938-39
Jacksonville, Ala.	Princess	J. L. Townley	1939-40 1937-38 1938-39
Leesburg, Fla.	Palace	Earle Fain	1936-37 1937-38 1938-39 1939-40
Newport, Tenn.	Winston	J. W. Baird	1936-37 1937-38 1938-39 1939-40
Statesboro, Ga.	Georgia	H. H. Macon	1936-37 1937-38 1938-39 1939-40
Summerville, Ga.	Royal	C. W. Maxey	1936-37 1937-38 1938-39 1939-40
Sylvania, Ga.	Strand	W. H. Karrh	1936-37 1937-38 1938-39 1939-40
Metter, Ga.	Dixie	W. H. Karrh	1937-38 1938-39 1939-40
Tallassee, Ala.	Roxy	Sam H. Thornhill	1937-38 1938-39
Tarpon Springs, Fla.	Royal	Nick Marlemes	1936-37 1937-38 1938-39
Thomaston, Ga.	Silvertown	Ed Beach	1936-37 1937-38 1938-39
Titusville, Fla.	Magnolia	Thomas S. Brandon	1936-37 1937-38 1938-39
Winder, Ga.	Strand	Mrs. P. M. Wise	1936-37 1937-38 1938-39
Swainsboro, Ga.	Dixie	W. M. Karrh	

[fol. 3035-b] Filed (2). Dept. Exhibit #136. Paul S. Wilson, Testimony. Aug. 21, 1941. L. B. Ormes, Clerk. By, L. E. Wasson, Chief, D. C.

Independent Circuits

The following list covers towns where franchises have been sold—

Circuit	Headquarters	No. Theatres	Period Covered
Martin Theatres	Columbus, Ga.	35	1936-37 1937-38 1938-39 1939-40 1940-41
Nat Williams	Thomasville, Ga.	4	1936-37 1937-38 1938-39 1939-40 1940-41 1941-42
Wometco Theatres	Miami, Fla.	20	1937-38 1938-39 1939-40 1940-41 1941-42 1942-43 1943-44
Independent Theatres (S. H. Borisky)	Chattanooga, Tenn.	6	1938-39 1939-40
Pal Amusement Company (J. T. Douglas)	Vidalia, Ga.	5	1936-37 1937-38 1938-39
L. J. Duncan	West Point, Ga.	13	1936-37 1937-38 1938-39
O. C. Lam	Rome, Ga.	7	1937-38 1938-39 1939-40
Manning & Wink	Marietta, Ga.	6	1937-38 1938-39 1939-40
F. O. Mullin	Haines City, Fla.	6	1937-38 1938-39 1939-40

[fol. 3035-c] Stamp: Filed (3). Dept. Exhibit #136. Paul S. Wilson, Testimony. Aug. 21, 1941. L. B. Ormes, Clerk. By L. E. Wasson, Chief, D. C.

Circuit Accounts

Circuit	Headquarters	No. Theatres	Period Covered
Lucas & Jenkins	Atlanta, Ga.	11	1935-36 1936-37 1937-38 1938-39 1939-40 1940-41
Florida State Theatres	Jacksonville, Fla.	43	1936-37 1937-38 1938-39 1939-40 1940-41 1941-42
Wilby Circuit	Atlanta, Ga.	17	1937-38 1938-39 1939-40

[fol. 3036] Stamp: Filed and Marked for Identification. Defts. Gen. Exhibit No. 215. Kermit Stengel, Testimony. Aug. 28, 1941. L. B. Ormes, Clerk. By L. E. Wasson, Chief, D. C.

DEFENDANT'S EXHIBIT 215

Theatre Operations—Year Ending Dec. 31, 1939

Number of Weeks Operated	52	52	52	17	52	19½
	Palace Greenville, Ky.	Lido Providence, Ky.	Lyric Manchester, Tenn.	Rex Cowan, Tenn.	Capitol Oneida, Tenn.	Yancey Burnsville, N. C.
Net Profit on Popcorn Sales	$ 905.99	147.76	88.90	147.26	252.21	278.66
Net Profit on Screen Advertising	570.00	508.20	439.65	91.80	290.40	91.80
Total Profit on Popcorn Sales & Screen Advertising	$1475.99	655.96	528.55	239.06	542.61	370.46
Net Profit or Loss from Theatre Operations	1019.27**	1936.79**	3113.34	254.97**	149.76	769.56**
Total Net Profit or Loss from All Sources	$456.72	1280.83**	3641.89	15.91**	692.37	399.10**

** These figures indicate a Loss.

Remarks:

Lyric Theatre, Manchester, Tenn.; we receive only 50% of the net profit on popcorn from this operation.

[fol. 3037] Stamp: Filed Defts. Gen. Exhibit No. 216. Kermit Stengel, Testimony: Aug. 28, 1941. L. B. Ormes, Clerk. By L. E. Wasson, Chief, D. C.

DEFENDANT'S EXHIBIT 216

Percent Comparison of Saturday, or Western Feature Operation, as Against Average Business of Other Days in Week
(Period covered—Calendar Years 1939 and 1940)

						Saturday Programs	
	Town	Theatre		Saturday	Other Days	Double Feature Program	Single Feature Program
Cherokee Amusements, Inc.	Oneida, Tenn.	Capitol	(7)*	39%	10.2%	103 (39%)	1 (30.2%)
	Spruce Pine, N. C.	Carolina	(6)*	44%	11.2%	101 (39.5%)	3 (39.3%)
	Lenoir City, Tenn.	Grand	(6)*	35%	13%	103 (35.7%)	1 (32.1%)
Rockwood Amusements, Inc.	McKenzie, Tenn.	McKenzie	(7)*	40%	10%	76 (39.5%)	15 (40.8%)
	Central City, Ky.	State	(7)*	36%	10.7%		104 (36%)
	Guthrie, Ky.	Lyric	(7)*	28%	12%	34 (28.6%)	70 (28.5%)
	Rogersville, Tenn.	Rogersville	(6)*	40%	12.2%	85 (38.9%)	19 (40.2%)

* Figures in parentheses indicate number of days per week theatre operates.

[fol. 3038–3041b] Stamp: Filed Deft's. Exhibit No. 217. Kermit Stengel, Testimony. Aug. 28, 1941. L. B. Ormes, Clerk. By L. E. Wasson, Chief, D. C.

DEFENDANT'S EXHIBIT 217

Comparison of Percent of Saturdays as to Other Week Days Where Only *Single Features* Were Exhibited on Saturday. Covering the Period From July 1, 1937 to June 30, 1940.

Town	Theatre		% Saturday	% Other Days	No. of Weeks
Harriman, Tenn.	Princess	(6)	29.4%	14.1%	31
Gallatin, Tenn.	Roxy	(6)	28.8%	14.2%	19
Bowling Green, Ky.	Diamond	(7)	34.6%	10.9%	156
Maryville, Tenn.	Capitol	(6)	30.5%	11.6%	156
Alabama City, Ala.	Ritz	(7)	28.4%	10.2%	156

* Figures in parenthesis indicate number of days per week theatre operates.

[fol. 3042] DEFENDANT'S EXHIBIT 223

Total Revenue Received by Paramount Pictures from the Liquidation of Feature Contracts for the Towns and Seasons Set Forth Below, Including the Exhibition of Re-issues and Repeat Runs.

Season	Madisonville, Ky.	Earlington, Ky.
1935–36	$1734.00	$ 552.50
1936–37	$ 12.50 (No deal this season —one picture spot-booked)	$1342.16
1937–38	$1513.70	$1226.20
1938–39	$1904.38	$ 475.00 (Estimated original revenue)
		$ 152.49 (Actually played before selling out)
1939–40	$2031.00	$ 585.61

* * * * *

Minimum Adult Evening Admission Prices as Specified on the Above Listed Feature Contracts for the Towns and Seasons Set Forth Below.

Season	Madisonville, Ky.	Earlington, Ky.
1935–36	$ .25	$ .15
1936–37	No deal	$ .15
1937–38	$ .25	$ .27
1938–39	$ .25	$ .15

[fol. 3043] DEFENDANT'S EXHIBIT 224

Total Revenue Received by Paramount Pictures from the Liquidation of Feature Contracts for Hopkinsville, Kentucky during the Seasons set forth below, including the Exhibition of Re-issues and Repeat Runs.

Season	
1935–36	$2190.00—Crescent
1936–37	$2438.38—Anderson
1937–38	$2661.85—1st. Run—Crescent
1937–38	$ 771.00—2nd. Run—Crescent

[fol. 3044-3048] DEFENDANT'S EXHIBIT 225

Total Revenue Received by Paramount Pictures from the Liquidation of Feature Contracts for Bornawsville, Tennessee during the Seasons set forth below, including the Exhibition of Re-issues and Repeat Runs.

Season		
1934-35	$ 581.00	Lawing
1935-36	$ 785.00	Crescent
1936-37	$ 383.50	Crescent—Spot-booked in conjunction with deal for 1937-38
1937-38	$ 618.50	Crescent
1938-39	$1041.82	Crescent
1939-40	$1345.95	Crescent

[fol. 3049] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE

Civil Action No. 54

UNITED STATES OF AMERICA, Plaintiff,

vs.

CRESCENT AMUSEMENT COMPANY, INCORPORATED, et al., Defendants

FINDINGS AND CONCLUSIONS—Filed March 3, 1943

The above entitled cause came on for hearing before the Court on July 7, 1941; appearances for plaintiff, United States of America were Horace Frierson, Jr., United States District Attorney, O. W. Hughes, Assistant United States Disfrict Attorney, Thurman Arnold, Assistant Attorney General, Robert L. Wright, Allen A. Dobey, J. Stephen Doyle, John F. Claggett, Special Assistants to the Attorney General, Albert Boggers, J. Frank Cunningham and Seymour Simon, Special Attorneys. Appearances for the defendants, Crescent Amusement Company, Inc., Anthony Sudekum, Kermit Stengel, R. E. Baulch, Kentucky Amusements, Inc., Lyric Amusement Company, Nu Strand Company, Rockwood Amusements, Inc., Cumberland Amusement Co., Strand Enterprise Corporation, Cherokee Amusement Company, Inc., Armistead, Waller, Davis & Lansden, Attorneys, Nashville; Muscle Shoals Theatres, Inc., and Louis Rosenbaum, W. H. Mitchell, Attorney, Florence, Alabama; Universal Pictures Company, Inc., Universal Film Exchanges, Inc., and United Artists Corporation,

Arthur F. Driscoll, Edward C. Raftery and Benjamin Pepper, Attorneys, New York City, J. D. Mosby and Cornelius, McKinney & Gilbert, Attorneys, Nashville, Tennessee; Columbia Pictures Corporation, Louis D. Frolick, New York City; Cornelius, McKinney & Gilbert, and J. D. Mosby, Attorneys, Nashville, Tennessee.

[fol. 3050] The cause was submitted upon the pleadings, evidence, exhibits, argument and briefs of counsel for plaintiff and defendants, and after due consideration thereof the Court enters its findings of fact and conclusions of law as follows:

Findings

A—Distributor Defendants and Co-Conspirators.

1. Columbia Pictures Corporation is a distributor of motion pictures with its principal offices in New York City. It is engaged in the production and distribution of motion pictures but has no theatres. It serves the area here involved with films from exchanges at Atlanta, Memphis and Indianapolis. During the 1934-1935 season it released 35 feature pictures, 6 of which were designated as "A Features". For the 1935-1936 season 37 feature pictures were released, of which 5 were designated as "A-Features". During the 1936-1937 season it released 39 feature pictures and designated 7 as "A-Features". In the 1937-1938 season 40 feature pictures were released, of which 11 were designated as "A-Features", and during the 1938-1939 season it released 36 feature pictures, of which 8 were designated as "A-Features".

2. United Artists Corporation is engaged only in the distribution of motion pictures, with its principal office in New York City. It serves the area here involved with films from exchanges in Atlanta, Cincinnati, New Orleans and St. Louis. The pictures released are produced by various individuals and corporations. The corporation secures the approval of the producer for each contract for the exhibition of his features. Consequently it made a separate contract for each producer's feature pictures in contrast to other major distributors which ordinarily made a single contract with exhibitors for all features released during the [fol. 3051] season. During the 1934-1935 season it released 22 feature pictures, and during the 1935-1936 season 15 pic-

tures were released. For the 1936-1937 season the number of features released was 19; for the 1937-1938 season the number of features released was 23; for the 1938-1939 season the number released was 15. Most of these pictures have been features of high quality and have been played for a week or more in a first-run theatre in Birmingham or Memphis.

3. Universal Film Exchanges, Inc., is a distributing corporation with its principal office in New York City. It serves the area here involved with films produced by an affiliated corporation from exchanges in Atlanta, Indianapolis, and Memphis.

During the 1934-1935 season Universal released 33 features, 9 of which were exhibited in a first-run theatre in Memphis for a week or more. During the 1935-1936 season it released 22 features, 6 of which played in a first-run theatre in Birmingham or Memphis for a week or more. For the 1936-1937 season it released 34 features, 6 of which played in a first-run theatre in Birmingham or Memphis for a week or more. For the 1937-1938 season 40 features were released, 8 of which were exhibited in a first-run theatre in Memphis or Birmingham for a week or more. During the 1938-1939 season 41 features were released, 5 of which played in a first-run theatre in Birmingham or Memphis for a week or more.

4. Twentieth Century-Fox Film Corporation has its principal office in New York City. It is engaged directly in the production and distribution of motion pictures and has a substantial stock interest in National Theatres Corporation which operates a large circuit of theatres. The area here involved is served with films from exchanges in Atlanta, Memphis and Indianapolis.

During the 1934-1935 season this distributor released 49 features, and during the 1935-1936 season 58 features were released. For the 1936-1937 season 62 pictures were released and during the 1937-1938 and 1938-1939 season it released 50 and 57 pictures, respectively.

[fol. 3052] 5. Loew's Incorporated is engaged in the distribution of motion pictures and is also interested, either directly or through subsidiaries, in production and exhibition. Its principal office is in New York City, and the area

here involved is served with films from exchanges in Memphis, Atlanta, Indianapolis, and New Orleans.

During the 1934-1935 season it released 44 feature pictures 26 of which played in a first-run theatre in Birmingham or Memphis for a week or more. For the 1935-1936 season it released 46 features, of which 26 played in a first-run theatre in Memphis or Birmingham for a week or more. During the 1936-1937 season 53 features were released, 32 of which exhibited a week or more in a first-run theatre in Memphis or Birmingham. In the season of 1937-1938, 45 pictures were released, 37 of which were played for a week or more in a first-run theatre in Memphis or Birmingham, and during the 1938-1939 season 49 feature pictures were released, 35 of which played a week or more in a first-run theatre in Memphis or Birmingham.

6. Paramount Pictures, Inc., is a distributing corporation and it is also engaged, either directly or through subsidiaries, in production and exhibition. It distributes pictures in certain states through a wholly owned subsidiary, Paramount Film Distributing Corporation. Its principal office is in New York City and it serves the area here involved with films out of exchanges in Atlanta, Memphis, Indianapolis and Cincinnati. It is interested in a substantial number of theatres in larger cities including the Paramount Theatre in Nashville, and owns a half interest in numerous theatre circuits operating in many cities of the South, and other parts of the United States.

[fol. 3053] During the 1934-1935 season it released 52 feature pictures, 27 of which were exhibited in a first-run theatre in Memphis or Birmingham for a period of a week or more. For the 1935-1936 season 71 feature pictures were released, 33 of which played at a first-run theatre in Memphis or Birmingham, for a week or more. During the 1936-1937 season 74 pictures were released, 28 of which were exhibited for a week or more at a first-run theatre in Birmingham or Memphis. During the 1937-1938 season this distributor released 56 pictures, 21 of which were exhibited in a first-run theatre in Memphis or Birmingham for a week or more. And during the 1938-1939 season 60 pictures were released, 17 of which were exhibited in Memphis or Birmingham at a first-run theatre for a week or more.

7. RKO Radio Pictures, Inc., is a distributing and producing corporation with its principal office in New York City.

It is also affiliated with corporations engaged in exhibition. The area here involved is served with pictures out of exchanges in Atlanta and Memphis. During the 1934-1935 season it released 43 feature pictures, 25 out of which played in a first-run theatre in Memphis or Birmingham for a week or more. For the 1935-1936 season 38 pictures were released, of which 13 played in a first-run theatre in Memphis or Birmingham for a week or more. During the 1936-1937 season this distributor released 42 pictures, out of which 19 were exhibited at a first-run theatre in Memphis or Birmingham for a week or more. During the 1937-1938 season 49 pictures were released of which 14 were exhibited for a week or more by a first-run theatre in Birmingham or Memphis. During the 1938-1939 season 45 pictures were released, out of which 13 played a first-run theatre in Memphis or Birmingham for a week or more.

8. Warner Brothers, Pictures, Incorporated, is interested, either directly or through subsidiaries, in the production, distribution, and exhibition of motion pictures. It distributes pictures through a wholly owned subsidiary, [fol. 3054] Vitagraph, Inc., the principal office of which is in New York City. It serves the area here involved with films out of exchanges at Memphis and Atlanta. It also operates a large circuit of theatres located principally in the larger cities.

During the 1934-1935 season this distributor released 50 pictures, 40 of which were exhibited for a week or more at a first-run theatre in Memphis or Birmingham. For the 1935-1936 season 55 pictures were released, of which 35 were exhibited in Memphis or Birmingham at a first-run theatre for a week or more. During the 1936-1937 season this distributor released 61 pictures, of which 29 were exhibited at a first-run theatre in Memphis or Birmingham for a week or more. For the 1937-1938 season 57 pictures were released, out of which 28 were exhibited for a week or more in a first-run theatre in Birmingham or Memphis. During the 1938-1939 season 52 pictures were released, of which 31 were exhibited for a week or more at a first-run theatre in Memphis or Birmingham.

9. Most feature pictures are licensed at or near the beginning of the season during which they are to be released and before they have been made. In the selling season of each year, (spring and summer), the distribtuor's salesmen

approach exhibitors with data concerning the number and quality of features the distributor intends to release during the succeeding motion picture season, which generally begins on September 1st of each year, and terminates on the August 31st following. Annual license contracts are then entered into for the exhibition of the features to be released during the season, which fix the rentals to be paid, run on which the films are to be played, clearance, if any, which the exhibitor's theatre takes over other theatres, and minimum admission prices at which the films are to be shown.

As the films are released, that is, made available for exhibition in theatres, prints are sent to the various exchanges from New York, New Jersey, or California and [fol. 3055] delivered to the exhibitors for exhibition in accordance with their contracts. Although the films are referred to in the trade as having been bought, the contract is always one of license rather than sale.

The exhibitor ordinarily returns the print to the distributor's exchange after each exhibition, where it is repaired or reconditioned when necessary, and supplied to other theatres, each print serving a large number of theatres. Prints in many instances move across state lines in the course of their transportation from exchanges to theatres since many theatres are located in states other than those in which the exchanges are situated. Payment of film rental is generally made throughout the season as the films are used, with final settlement at the end of each season. The distributor's license contracts are generally negotiated by salesmen or exchange managers and district managers, on behalf of the distributor, but are always subject to approval by the New York office. The ordinary course of business is to have the exhibitor sign an application, which is then forwarded to New York for approval or rejection. If approved, it is signed by the distributor and returned to the exhibitor.

10. About ninety per cent of the total film rental paid by the exhibitor defendants during the five years preceding the filing of this suit was paid to the eight major distributors.

B-Exhibitor Defendants

Crescent

11. The principal exhibitor defendant, Crescent Amusement Company, is a theatre-operating corporation organ-

ized in 1911, a majority of the stock of which is owned by the defendant Anthony Sudekum, its president, his wife, Nettie Sudekum, his brother, Harry Sudekum, and his two sons-in-law, the defendants Kermit Stongel and R. E. [fol. 3056] Baulch. Baulch is secretary and treasurer of the company, and Stengel is employed by it as an assistant to Mr. Sudekum.

The following tabulation shows the number and location of the theatres owned by the Crescent outside of Nashville on August 11, 1934, and August 11, 1939, the date on which this suit was filed, and indicates the extent of Crescent's expansion during that period.

Town	1930 Population	Number on 8/11/34	1940 Population	Number on 8/11/39
Alabama City, Ala.	8,544	1	.....	1
Bowling Green, Ky.	12,348	3	14,585	3
Brownsville, Tenn.	3,204	0	4,012	1
Clarksville, Tenn.	9,242	2	11,831	2
Cleveland, Tenn.	9,136	1	11,351	2
Columbia, Tenn.	7,882	1	10,579	2
Decatur, Ala.	15,593	2	16,604	2
Dyersburg, Tenn.	8,733	2	10,034	2
Earlington, Ky.	3,309	0	2,858	2
Franklin, Ky.	3,656	0	3,940	1
Gadsden, Ala.	24,042	2	36,975	3
Gallatin, Tenn.	3,050	0	4,829	1
Greeneville, Tenn.	5,544	1	6,784	3
Harriman, Tenn.	4,588	1	5,620	2
Hopkinsville, Ky.	10,746	2	11,724	3
Lebanon, Tenn.	4,656	1	5,950	1
Madison, Tenn.	.....	0	900	1
Madisonville, Ky.	6,908	2	8,209	2
Maryville, Tenn.	4,958	2	5,609	3
Morristown, Tenn.	7,305	1	8,050	2
Murfreesboro, Tenn.	7,993	1	9,495	1
Paris, Tenn.	8,164	1	6,395	2
Princeton, Ky.	4,764	0	5,389	1
Springfield, Tenn.	5,577	1	6,688	2
Union City, Tenn.	5,865	2	7,256	4
[fol. 3057]				
		Number on 8/11/34		Number on 8/11/39
Total		29		49

12. On August 11, 1934, Crescent had competition in only six of its towns outside of Nashville, Cleveland, Tennessee, Maryville, Tennessee, Greenville, Tennessee, Union City, Tennessee, Gadsden, Alabama, and Madisonville, Kentucky, (competitive with Roxy Theatre in Earlington). In 1935 the competition at Cleveland was bought out and the competition at Union City was eliminated with the organization of Strand Enterprises, Inc. In 1936 the opposition at Gadsden was also bought out, and in the same year the competition at Greenville and Maryville was elimi-

nated with the organization of Cherokee. In August 1939, Crescent's competition at Earlington was bought out.

On August 11, 1939, Crescent had competition in only three towns outside of Nashville. These were Gallatin and Harriman, Tennessee, and Franklin, Kentucky, in each of which a single independent theatre was then operated.

Since the filing of this suit, Crescent has bought out the competitor who was operating at Harriman on August 11, 1939, (Tim Smith) but his theatre is now operated by another independent. A competitor who opened in Paris in 1940 (Diggs) was bought out by Crescent the same year. Additional theatres have been opened by Crescent since August 11, 1931, at Lebanon and Murfreesboro, Tennessee and Decatur, Alabama.

13. Crescent has owned half of the capital stock of Cumberland Amusement Company, Lyric Amusement Company and Strand Enterprises, Inc., since their respective dates of organization.

On August 11, 1939, Crescent also owned a half interest in the following theatre-operating corporations not directly involved in this suit: Nu-Strand Corporation, which owned one-half interest in three theatres at Kingsport, Tennessee, which were leased to and operated by a Paramount affiliate, [fol. 3058] Kingsul, Inc.; Lewisburg Theatres, Inc., operating one theatre at Lewisburg; and Auditorium Company, operating one theatre at Shelbyville, Tennessee. On the same date, Sudekum owned all of the stock of the Hartselle Theatre Corporation, Inc., operating theatres at Hartselle, Alabama, and Rusellville, Alabama.

Muscle Shoals

14. Muscle Shoals Theatres, Inc., was organized in 1924 and Sudekum was its president from its organization to its dissolution in 1937. Sixty-two and one-half per cent of its stock was owned by Crescent and the remaining thirty-seven and one-half per cent by the defendant, Louis Rosenbaum. Pursuant to an arrangement made in 1937 between Rosenbaum and Sudekum, Crescent transferred its stock to Rosenbaum, who then transferred fifty per cent to Mrs. Sudekum. The corporation was then dissolved, and business was continued as a partnership between Rosenbaum and Mrs. Sudekum, operated under the name of Muscle Shoals Theatres. Rosenbaum acted as manager of the

theatres controlled by Muscle Shoals before and after the corporation was dissolved. On August 11, 1934, Muscle Shoals owned four theatres in Florence, Sheffield, and Tuscumbia, Alabama, adjacent cities with the total population of approximately 30,000 and one theatre in Athens, Alabama. (4342). There was no competition in any of the Muscle Shoals towns on that date.

On August 11, 1939, Muscle Shoals had competition in Athens, Alabama, where it had acquired a second theatre in June 1939. Its competitor in Athens, Alabama, was bought out in December 1939, and Muscle Shoals has had no theatre competition since that time.

[fol. 3059] Lyric

15. Lyric Amusement Company was organized in 1928, and Sudekum has been its president since at least August 11, 1934. On that date it operated the only two theatres in Huntsville, (13,050) Alabama. On August 11, 1939, it was operating the only three theatres in Huntsville. It had no theatre competition in Huntsville on either date. There has been no change in its situation since August 11, 1939.

Cumberland

16. Cumberland Amusement Company was organized in 1928 and Sudekum has been its president since at least August 11, 1934. On that date Cumberland operated seven theatres in seven Tennessee towns, whose 1930 population varied from 2100 to 4000. There was no theatre competition in any of these towns.

On August 11, 1939, Cumberland owned thirteen theatres in ten Tennessee towns, whose 1940 populations varied from 1500 to 5300 and it had competition in only one of these towns—McMinville, in which a competing theatre had been opened in June 1939. In October 1940 Cumberland opened a second theatre in Tullahoma, Tennessee.

Strand

17. Strand Enterprises, Inc., was organized in 1935 and either Baulch or Stengel has been its vice president and secretary since its organization. On August 11, 1939, it owned twenty-one theatres in seventeen towns in Arkansas, western Tennessee, Mississippi and Western Kentucky, only four of which exceeded 3,000 in population and none of which was larger than 4,300.

Rockwood

18. Rockwood Amusement Company was organized in February 1936 and the defendant Stengel has always been its president. The capital stock of this company (1,000 [fol. 3060] shares of no par value) was issued to Stengel in return for two theatres at Rockwood and Tracy City, Tennessee, respectively. The equipment for the Tracy City theatre was given to Stengel by Sudekum. Rockwood's working capital was principally supplied by loans from Sudekum, supplemented by additional loans from Ruffin and Muscle Shoals. Its executive office has always been in the same building as that occupied by the Crescent executive office and this space was first donated by and later leased from Crescent.

19. On August 11, 1939, Rockwood operated directly eight theatres in eight towns in Tennessee and four theatres in four towns in Kentucky, all with 1940 populations of less than 3,000, except Rockwood, Tennessee, (3,981) Central City, Kentucky, (4,199) and Providence, Kentucky, (4,397). On that date it had no theatre competition in any of these towns.

On the same date, (August 11, 1939) Rockwood owned a half interest in the following theatre operating corporations in each of which Stengel was an officer: Cherokee Amusement Company, Ruffin Amusements, Inc., Chickasaw Amusement Company, Kentucky Amusement Company, Inc., Dickson Theatres, Inc., Lawrenceburg Theatres, Inc., and Mid-State Theatres, Inc.

The only change in the Rockwood situation since August 11, 1939, has been the acquisition of an additional theatre at Clinton, Tennessee.

20. The following tabulation indicates the location and extent of the theatre operations of other corporations in which Rockwood owned an interest on August 11, 1939. (Ex. 343).

[fol. 3061]

Name of Corporation	Town	1940 Population	No. of Theatres Operated
Ruffin Amusements, Inc.	Hickman, Ky.	2268	2
Ruffin Amusements, Inc.	Covington, Tenn.	3513	1
Ruffin Amusements, Inc.	Greenfield, Tenn.	1509	1
Ruffin Amusements, Inc.	Halls, Tennessee	1511	1
Ruffin Amusements, Inc.	Martin, Tenn.	3587	1
Ruffin Amusements, Inc.	Newbern, Tenn.	1740	1
Chickasaw Amusement Co.	Alamo, Tenn.	1137	1
Chickasaw Amusement Co.	Milan, Tenn.	3035	1
Chickasaw Amusement Co.	Benton, Ky.	1906	1
Kentucky Amusement Co., Inc.	Elizabethtown, Ky.	3667	1
Dickson Theatres, Inc.	Dickson, Tenn.	3504	1
Lawrenceburg Theatres, Inc.	Lawrenceburg, Tenn.	3807	1
Mid-State Theatres, Inc.	Tompkinsville, Ky.	1438	1

Since August 11, 1939, Mid-State has acquired additional theatres in Cookeville, Tennessee, (4,364), Carthage, Tennessee, (1,512) and Burksville, Kentucky, (1,092).

Cherokee

21. Cherokee Amusements, Inc., was organized in August 1936. On August 11, 1939, it owned eleven theatres in seven towns in east Tennessee and three theatres in three towns in North Carolina. On that date there was no theatre competition in any of the towns in which Cherokee operated. The only towns which had a population of more than 3,000, were Erwin, (3,350), La Follette, (4,010), and Lenoir City, (4,373), Tennessee. Cherokee acquired an additional theatre at Jellico, Tennessee, in January 1941.

Newport

22. Newport Amusement Company was organized in February 1937, and since its organization half of its capital stock has been owned by Cherokee, and Stengel has been one of its officers. On August 11, 1939, it operated theatres in Newport, Tennessee, (3,575), and Copperhill, Tennessee, (1,005). There has been no change in its situation since that date.

[fol. 3062] 23. On August 11, 1934, the defendant exhibitors and their affiliates operated in thirty-two towns in Tennessee, (excluding Nashville) Kentucky, and Alabama, in six of which they had competition. On August 11, 1939, the defendant exhibitors and their affiliates, with the exception of Strand, heretofore dismissed as a defendant, operated in seventy-eight towns in Tennessee, (excluding Nashville) Kentucky, Alabama, and North Carolina, in five of

which they had competition, and the only towns in which they have competition today outside of Nashville, are Gadsden, Alabama, Harriman, Gallatin and McMinville, Tennessee, and Franklin, Kentucky. In two of these towns—Gadsden, Alabama, and Harriman, Tennessee, the independent theatres have opened since the filing of this suit and two more—Franklin, Kentucky and Gallatin, Tennessee—are towns which Crescent entered less than two years before the filing of this suit.

Of the forty-five towns in Tennessee listed in the 1940 census as having populations between 2,500 and 10,000, Crescent and its affiliates now operate theatres in all but nine. The independents operating in three of those nine towns have already been approached by Sudekum emissaries with the suggestion that they sell to one of the defendant exhibitors.

C—Elimination of Competition

24. In 1928 Crescent and C. A. Crute relieved themselves of the necessity of continuing to compete with each other in Huntsville, Alabama, by organizing Lyric whose capital stock was divided between them and transferring their respective theatres to it. In the same year, Crescent commenced the construction of a theatre in Fayetteville, Tenn., in which the old Cumberland Theatre Company was then operating. This threatened competition was forestalled by [fol. 3063] the organization of Cumberland Amusement Company, Inc., to which Crescent transferred its new theatre in Fayetteville, and Cumberland Theatre Company transferred the theatres it was then operating in Fayetteville, McMinville, Tullahoma and Franklin, Tennessee. The Capital stock of the new company was divided between Crescent and the owners of the Cumberland Theatre Company, and the latter were thereby not only relieved of competition from Crescent in Fayetteville, but protected against Crescent competition in their other three towns. In 1935 Haynes was operating in opposition to Crescent in Union City, Tennessee, Crescent disposed of this competition by joining with Haynes in the organization of Strand, which was formed for the purpose of expanding into smaller towns in West Tennessee, Mississippi and Arkansas.

25. In 1936 Crescent and Parrott and Hendren were competing in Greenville and Maryville, Tennessee, after having

invaded each other's towns. Crescent eliminated this competition by an arrangement under which Parrott and Hendren transferred their Greenville and Maryville theatres to Crescent and their six theatres in Erwin, La Follette, Lenoir City, and Sweetwater to Cherokee, a newly formed corporation whose capital stock was divided between Parrott and Hendren and Rockwood. Through this arrangement, Parrott and Hendren protected themselves against Crescent competition in their other towns and secured the benefits which accompany affiliation with a circuit as powerful as Crescent.

Crescent paid a total of $25,000.00 to Parrott and Hendren for their three theatres at Maryville and Greenville, Tennessee, which were transferred outright to Crescent, and for a one-half interest in their six theatres in Erwin, La Follette, Lenoir City and Sweetwater. As a part of the deal, Parrott and Hendren agreed that Cherokee would pay Sudekum a salary of $200.00 a week for his advice and as- [fol. 3064] sistance in running the business. Sudekum did not become an officer of the corporation, but Stengel did and in 1938 Stengel took over the film buying for the theatres but received no salary from Cherokee at any time. However, in accordance with the agreement made with Hendren, Sudekum got $10,400.00 each year ($200.00 a week) from Cherokee for his advice. For his $25,000.00 investment Sudekum thus received stock of a par value of $25,000.00, one-half of the $50,000.00 stock issued by Cherokee, the three theatres in Maryville and Greenville outright, and a salary of $10,400.00 a year.

26. In 1937 W. F. Ruffin and Chickasaw Amusement Company, a subsidiary of Rockwood, were operating in the same general area. Ruffin's theatres were in Martin, Covington and Newborn, Tennessee, and Chickasaw's were in Milan and Humboldt, Tennessee. In 1937 Ruffin's theatres were transferred to Ruffin Amusement Company, whose capital stock was divided between Ruffin and Rockwood, and shortly thereafter, Ruffin was sold a half interest in Chickasaw. In the same year, J. W. Baird, of Newport, Tennessee, in order to avoid Crescent competition, transferred his theatre in Newport to Newport Amusement Company, whose capital stock was divided between Baird and Cherokee.

27. Muscle Shoals operates in Northwestern Alabama; Crescent and its subsidiaries, Cumberland and Lyric operate in south central Kentucky, Northeastern Alabama and Tennessee. Rockwood and its subsidiaries operate in the smaller towns in the same area where Crescent operates, except that Cherokee operates in three of the larger towns in East Tennessee and in three towns in North Carolina.

[fol. 3065] 28. The defendant exhibitors and their affiliates have never been in competition with each other, although most of them have expanded into new towns since their respective organizations. This is accounted for by the common control centered in the defendant, Sudekum, which makes any express agreement, dividing territory between the defendants, unnecessary, but nevertheless effectively prevents any competition between the units comprising the Sudekum Circuit.

29. The mutual interest which Sudekum, Rosenbaum and Stengel had in protecting their territories from competition, is demonstrated by the agreements which were made by them when theatres were taken over. For example, the agreement made by Rosenbaum with respect to the Athens take-over provides that Buchanan would stay out not only of Alabama, but Tennessee, as well, for five years. Rosenbaum was not then operating any theatres in Tennessee, and never had operated a theatre in Tennessee, and the plain purpose of including Tennessee in the agreement was simply to protect the Tennessee interests of the defendant exhibitors and their affiliates.

30. Crescent also went out of its way to protect its affiliates as well as itself from competition as is indicated by the following agreements not to compete with Crescent or its affiliates, which Crescent secured in acquiring competing theatres.

On April 10, 1936, Bobbie Farley Crawford and Jack Crawford sold the Gadsden Theatre, Gadsden, Alabama, to Crescent Amusement Company; the Crawfords agreed that for a period of ten years they "will not engage in the motion picture show business, or other show business, or the vaudeville business, or any affiliated business connected therewith, either directly or indirectly, as proprietor, servant, agent, employee, stockholder, or otherwise, in any way, shape, form or fashion, in any city or town wherein the

Crescent Amusement Company or any of its affiliated or [fol. 3066] subsidiary companies are now engaged in a similar or like business * * * that they will not be employed by, and will not directly or indirectly work for, and will not be associated with others in any way in the operation of any picture show, vaudeville, or similar or affiliated business for a period of ten years from the date hereof, in the towns and places within the terms of the foregoing covenant * * * they will not engage in, or carry on, any picture show business, or vaudeville or affiliated business, either directly or indirectly, in the city of Gadsden * * *".

On April 21, 1936, C. G. Lawing and wife, Elon Lawing, sold to the Crescent Amusement Company, the Southland Theatre, Brownsville, Tennessee, and Gem Theatre, Paris, Tennessee. The Lawings agreed not to "operate any type or kind of moving picture show or vaudeville show, or own stock or be interested directly or indirectly in any moving picture show, or vaudeville show in any of the towns and counties in the States of Tennessee, Alabama, and Kentucky, where The Crescent Amusement Company, or its subsidiaries now own show houses, stock, or interest in moving picture shows or vaudeville shows, for a period of five years * * *".

On November 28, 1938, V. R. Anderson, F. L. May and C. P. Taylor, first parties, sold the Crescent Amusement Company, second party, the Kentucky Theatre, Hopkinsville, Kentucky. Anderson, May and Taylor agreed "not to engage in the picture show business either directly or indirectly, in any town, or city in the States of Kentucky, Tennessee or Alabama, in which said second party is directly or indirectly, interested in any theatre. Said party of the second part agrees that it will not either directly or indirectly, engage in the theatre business in any town in the State of Kentucky in which said first parties are directly or indirectly, interested in any theatre business."

[fol. 3067] On June 15, 1939, Roxy Amusement Company, J. D. Henry, Joe Wiley and Edward B. Wiley sold the Crescent Amusement Company the Roxy Theatre, Union City, Tennessee. The first named parties agreed that "they will not re-enter the moving picture business either directly or indirectly for a period of twenty-five years (25) from and after this date in any of the towns or cities in the States

of Tennessee, Arkansas, Alabama, Kentucky and North Carolina, in which the Crescent Amusement Company, its subsidiaries, associates and/or partners are now engaged in the moving picture theatre business. That is to say, the parties of the first part severally and jointly agree that they will not go into said business as a corporation or individually and will not enter any partnership or own stock in any corporation that is engaged in the moving picture business within said restricted territory for a period of twenty-five (25) years; and the said J. Dee Henry will not suffer or permit any member of his immediate family to engage in such business, or own any interest in such business within the limit of the territory aforesaid for a period of twenty-five (25) years."

On July 21, 1939, Roxy Theatre Company, Inc., and E. W. Dozier sold the Crescent Amusement Company the Roxy Theatre at Earlington, Kentucky. Dozier and Roxy Theatre Company, Inc. agreed that they "will not compete with the Crescent Amusement Company, or any of its subsidiaries or affiliates, in Earlington, Kentucky, or in any other town in which the Crescent Amusement Company, its subsidiaries or affiliates, now operate a moving picture theatre, for a period of ten years from August 1, 1939, and each of them agree that they will not directly or indirectly become interested in any company which may compete with the said the Crescent Amusement Company, or any of its subsidiaries or affiliates."

Each of these agreements not to compete with Crescent or its affiliates in other towns extended far beyond the [fol. 3068] protection of the business being sold, and demonstrated a clear intention to monopolize theatre operation wherever they or their affiliates secured a foothold.

31. In addition to the aforementioned agreements, the following non-competitive agreements, more narrowly limited in area, were taken from the exhibitors indicated at the time their theatres were acquired: (1) John Dee Henry (5 years in Hickman, Kentucky) R. M. Gutschalk, (5 years in Marshall, North Carolina) Walter Beymer, (5 years in Webster County, Kentucky) Cherokee Theatre Company, Copperhill, Tennessee, (10 years in Copperhill) J. E. Taylor, (10 years in Mitchell County, North Carolina); Tim W. Smith, (5 years in Roane County, Tennessee); B. F. Diggs, (15 years in Henry and adjacent counties,

Tennessee, and not to lease Gem Theatre building for theatre purposes for 15 years); Lodge 76, Free and Accepted Masons, (during such time in Hardin County, Kentucky, as Sudekum or Stengel are engaged in exhibition business).

32. Stengel admitted that in negotiating film contracts for Rockwood, he ordinarily negotiates contracts for its affiliates. Nor is there any doubt that Crescent and Rockwood and Rockwood's affiliates have jointly negotiated and executed contracts with the various distributors. The joint negotiation of Fox and Warner franchises is discussed under the heading of Franchises. The following are instances in which the record shows proof of concerted action by them.

Columbia: Crescent did not play any of Columbia's 1936-37 product and did not buy any of its 1937-1938 product until April and May 1939, when it made deals for Nashville and Bowling Green, Kentucky. Neither Rockwood nor its affiliates licensed the 1936-1937 or 1937-1938 product except for Guthrie, Kentucky, (1936-1937) and Elizabethtown, Kentucky, (1937-1938). On May 3, 1939, a deal, negotiated by Sudekum, was made for the exhibition of the 1938-1939 product in nine Crescent towns and ten Rockwood and [fol. 3069] Cherokee towns, (Ex. 3, 4, and 5).

Fox: On September 9, 1937, a two-year deal for the 1937-1938 and 1938-1939 product was made for towns acquired after the execution of the Crescent 1936 franchise; this deal included two Crescent towns, four Rockwood towns, five Cherokee towns, one Hartselle town, and one Mid-State town. (Ex. 15).

Loew's: On November 4, 1937, Kessnich, Loew's southern district manager, wrote Connors, Loew's eastern and southern sales manager, stating that he had "closed a deal with Tony Sudekum for his 22 situations and for the Sudekum Junior Circuit of 24 situations" (Ex. 170). The deal referred to (1937-38 season,) was finally approved on November 23, 1937, (Ex. 36). The situations referred to as the "Sudekum Junior Circuit" consisted of towns operated by Mid-State, Cherokee, Rockwood, Ruffin, Hartselle, Newport, Dickson, and Chickasaw. Contracts for the exhibition of Loew's 1938-1939 product in twenty-two Crescent towns, the four Muscle Shoals towns, two Mid-State towns, eight

Rockwood towns, seven Cherokee towns, one Lyric town, one Newport town, one Hartselle town, three Chickasaw towns, four Ruffin towns, and one Dickson town were all made on November 8, 1938 (Ex. 337).

Paramount: Beginning with the 1937-1938 season, Crescent and Rockwood and all of its affiliates were included in the five-year franchise dated July 28, 1938, as of November 1, 1937, (Ex. P. 24, P. 29, P. 30). These negotiations were carried on during a long period of time by Stengel, as well as Sudekum, on behalf of Crescent, and that Sudekum did not confine himself to the Crescent situations is shown by his insistence that Huntingdon, a Rockwood town, be granted clearance over McKenzie (Ex. 151).

R. K. O. The 1937-1938 RKO product was bought on November 23, 1937, for twenty-six Crescent towns, twelve Rockwood towns, one Cherokee town, and four Ruffin towns (Ex. 20). The RKO 1938-1939 product was bought [fol. 3070] on December 20, 1938 for twenty-three Crescent towns, seven Rockwood towns, one Lawrenceburg town, two Newport towns, and six Cherokee towns (Ex. 21).

United Artists: In licensing United Artists pictures, Crescent was accustomed to make single contracts of all its theatres, and after Rockwood was organized, its towns were included in these deals (Ex. 259). Crescent did not buy the 1937-38 product of United Artists and did not make a deal for the 1938-39 pictures until April 1939. Rockwood likewise did not buy the 1937-38 product and all of it and its subsidiaries' towns were included in the 1938-39 and 1939-40 contracts with Crescent. (Ex. 259, U. A. 1).

Universal: On December 28, 1938, Universal's 1938-39 product was licensed for twenty-four Crescent situations, and on the same date Stengel made a deal for the same product for two Mid-State towns, six Rockwood towns, five Cherokee towns, three Hartselle towns, and one Newport situation (Ex. 10). On December 29, 1938, the same season's product was licensed for the Crescent, Rockwood, Ruffin, Dickson, and Chickasaw situations in west Tennessee, which were served out of the Memphis exchange. (Ex. 10).

33. Film deals for Muscle Shoals have frequently been made by Rosenbaum independently of the Crescent deals.

With respect to some important deals, however, the Muscle Shoals negotiations have taken place in conjunction with Sudekum and Stengel. Rosenbaum admitted that he discussed the Muscle Shoals film deals with Sudekum when he came to Nashville. Rosenbaum testified that his theatres had never been put in with Sudekum's in a film deal, but the defendants themselves introduced a letter to Rosenbaum reciting the terms of a joint deal with Fox for Muscle Shoals and Crescent. (Def. Ex. 47).

In the fall of 1939 and winter of 1940, Sudekum, Stengel and Rosenbaum jointly negotiated with Loew's with regard to a proposed five-year franchise commencing with the 1939-40 season, (Ex. 177). All three of them met with representatives of Loew's to discuss the proposed franchise, and on one occasion Stengel and Rosenbaum met with Avey, Loew's [fol. 3071] Atlanta exchange manager in Florence, for the purpose of continuing their negotiations. No agreement upon a franchise was ever reached. Sudekum and Stengel finally did license Loew's 1939-40 product in January 1941 for some of their situations (Ex. 178, L. 7, L. 13, 300), and Rosenbaum licensed the 1939-40 product on November 25, 1940, (three months after the end of the season), when he entered into a contract with Loew's for Athens, Alabama, (Ex. L. 19).

Although its 1939-40 product was not licensed by Sudekum, Stengel or Rosenbaum until long after the end of the 1939-40 season, Loew's refused to license that product during the period, when the films were being released, to competing exhibitors in Gallatin, Tennessee, and Gadsden, Athens, and Decatur, Alabama, who had been attempting to secure it (Ex. 40, 41, 83, 84, 87, 89, 142, 178, 190, L. 7, L. 14).

In July 1938, the same month in which the Crescent-Rockwood franchise with Paramount was finally approved, an application for a three-year deal (1936-37, 1937-38, and 1938-39) which Muscle Shoals had made in October 1936 was also approved, (Ex. 218).

Crescent and Rockwood did not play United Artists' product in 1937-38. Muscle Shoals did not buy that distributor's 1938-39 product until April 1939, the month in which Crescent and Rockwood also made a deal for that product (Ex. U. A. 7). Nor did Crescent and Rockwood license that product until United Artists had rejected an application from a competitor of Muscle Shoals at Athens.

34. Sudekum has admittedly done the film buying for Lyric since Crute's death, and Lyric was included in the current five-year Paramount franchise (Ex. P. 24), the current four-year franchise with Warner (Ex. W. 14) and the current three-year franchise with Fox (Ex. F. 8).

35. In addition to the joint negotiation and execution [fol. 3072] of licensing agreements, the conduct of the respective businesses operated by the defendant exhibitors has been closely related.

Rockwood has been operating as a virtual branch of the Crescent business under the immediate supervision of Stengel, Sudekum's son-in-law. Rockwood's executive offices have always been in the same building as that occupied by the Crescent executive offices and this space was first donated by, and later leased from Crescent. Sudekum contributed the equipment for one of the two theatres with which that corporation started in business. He gave Stengel the half interests in the Dickson Theatres Corporation and Chickasaw Amusement Company that Rockwood now owns. Individual theatres were also transferred from Crescent subsidiaries to Rockwood, such as the Court theatre in Huntingdon, Tennessee, transferred from Strand to Rockwood in January 1937, (Ex. 290), and the Rogersville theatre at Rogersville from Cumberland to Rockwood in December 1937.

36. The distributors paid little attention to the separate corporate entities of Crescent and Rockwood in licensing films. On February 2, 1937, Rockwood licensed 36 of the Loew's 1936-37 releases for exhibition in Earlington, Kentucky, (Ex. 335). On December 1, 1936, Rockwood licensed 28 of the RKO 1936-37 releases for exhibition in Earlington, Kentucky, (Ex. 19), and on January 11, 1937, it licensed 40 of the Fox 1936-37 releases for exhibition in Earlington, Kentucky (Ex. 14). These agreements were made when Stengel was unsuccessfully attempting to lease Dozier's theatre in Earlington for Rockwood. Crescent then opened a theatre there in opposition to Dozier which apparently used the films licensed under the Rockwood contracts, as Rockwood never did operate a theatre in Earlington.

Sudekum, having supplied the necessary capital and motion picture experience to operate Rockwood successfully,

quite naturally wrote Oscar Morgan, Paramount southern district manager, in June 1937, that he owned a half interest [fol. 3073] in Cherokee, (Ex. 268), although Rockwood was the nominal owner of the half interest which Sudekum had paid for. Sudekum's explanation of this letter from the witness stand, that he spoke of owning this one-half interest as his in the same way that he would speak of owning something held by his wife, tends to further establish the obvious fact that Stengel and his Rockwood Company were nominal owners of Sudekum's interest in the Rockwood theatres, or so-called Sudekum Junior Circuit, just as his wife was the nominal owner of his interest in Muscle Shoals.

37. Sudekum and various Crescent employees took part in the negotiations leading to a number of Rockwood acquisitions, and Sudekum took part in the negotiations which led to the sale of Buchanan's theatre in Athens, Alabama, to Muscle Shoals.

Rosenbaum stated that he made only occasional visits to Nashville "every other month," "maybe three or four times a year". When confronted with evidence of the fact that during the year 1936, he had claimed an income tax deduction of $280.00 for "traveling on business to Nashville each month", he could not explain the discrepancy between this statement in his tax return and his prior testimony that he had gone to Nashvile only "once every two months, maybe three or four times a year."

He did attempt to reconcile his previous testimony that the objects of his trips to Nashville were personal rather than on Muscle Shoals business by saying that the purpose of the monthly business trips in 1936 was to persuade Mr. Sudekum to let him increase his interest in the business, which was done in 1937, just before the corporation was dissolved. No doubt at the same time that he discussed the business of Muscle Shoals with Mr. Sudekum, he discussed the advisability of increasing his own participation, but the fact remains that he did visit Nashville at regular intervals for the express purpose of consulting with Sudekum with respect to the conduct of the Muscle Shoals business.

[fol. 3074] 38. In the summer of 1935, Crescent opened the Capitol Theatre in Brownsville, Tennessee, in opposition to Lawing who had been operating the Southland Theatre

in that town since 1932; the Southland had been operated on a 15-cent and 25-cent admission price policy; Crescent operated its Capitol Theatre on 10-cent and 15-cent policy.

Shortly after Crescent opened in Brownsville, Lawing opened a tent show in Paris, Tennessee, a Crescent town which had only one theatre, and continued to operate the tent show until November 1935, when he converted a building in Paris into a theatre, (The Gem.)

39. When Lawing opened in Paris, he was able to get Paramount's 1934-35 product first run (Ex. p. 13), as Crescent did not license the Paramount product for any of its towns that season (Ex. 262). He was given no opportunity to license Paramount's 1935-36 product, however, and on August 22, 1935, Paramount licensed that season's product to Crescent for exhibition in Paris and 18 other towns (Ex. 263). Crescent paid Paramount $28,747.00 for the pictures it played during that season. (Ex. 266a).

Lawing also got the Fox 1935-36 product first run in Paris (Ex. F. 1, R. 766). This was because Crescent broke with Fox in the fall of 1935 on the 1935-36 product and bought it only for a few situations in April 1936, at the time it got together with Fox on a three-year deal for the entire circuit, commencing with the 1936-37 product (Ex. 205).

In addition to the Paramount 1934-35 product and the Fox 1935-36 product, Lawing was able to spotbook a few RKO pictures for Paris. He was unable to secure any other major product nor would any of the distributors sell him a second run; the ostensible ground of refusal was that the town was too small for a second run.

But the Crescent was allowed to repeat pictures which had played Lawing's theatre in Brownsville, a much smaller town.

[fol. 3075] 40. Lawing played Paramount's 1934-35 product in the Southland Theatre in Brownsville, (Ex. p. 14,). During the regular 1935-36 selling season, Lawing asked William Bugie, Paramount's Memphis exchange manager, and Scott Lett, a Paramount salesmen in Memphis, for a deal on the 1935-36 product, and was told that they could not negotiate for Brownsville at that time. On August 22, 1935, Paramount licensed its 1935-36 product to the Cres-

cent Theatre in Brownsville as part of the 19 town deal referred to above, (Ex. 263, 266a).

41. In July 1934, Lawing licensed Warner's 1934-35 product for exhibition in the Southland Theatre (Ex. W. 1). Early in 1935, Lawing attempted on several occasions to speak to Ochs, Warner's Memphis exchange manager, and Byron Adams, a salesman in Warner's Memphis exchange, about a deal on their 1935-36 product, but they refused to discuss the matter with him. One of them told him that their hands were tied in any situation Crescent had gone into. Warner's 1935-36 product was played in Brownsville by Crescent (Ex. 339).

42. Lawing played the Fox 1934-35 product in Brownsville and licensed their 1935-36 product on January 1935 (Ex. F. 3). It was not until February 11, 1935, that Crescent asked for the 1935-36 product for Brownsville (Ex. 47), and Wilson, at that time Fox Memphis exchange manager, replied on February 15, 1935, stating that the product had already been sold to Lawing. (Ex. 48).

43. Lawing played Loew's pictures every season from the time he opened the Southland Theatre until the 1935-36 season. (Ex. 293, 294, 295,). He played all but five of the features released by Loew's between September 1, 1932 and August 31, 1933, (Ex. 293), and every feature released by Loew's between September 1, 1933, and August 31, 1934, except one which he paid for but did not play (Ex. 294). Prior to August 1, 1935, he had played 27 features under his 1934-35 Metro contract (Ex. 295), which in view of the contract provision that he was not to commence playing the [fol. 3076] pictures licensed under it until December 15, 1934, was an average of almost four pictures a month. In view of this record, Willingham, Loew's Memphis exchange manager, was not exaggerating when he wrote C. E. Kessnich, Loew's southern district manager, on July 2, 1935, that Lawing "has been playing our product ever since he has been running the theatre there (Brownsville) 100%". (Ex. 163).

In the spring and early summer of 1935, Lawing spoke to Mock, a salesman in Loew's Memphis exchange, and Willingham, several times about licensing their 1935-36 product. After telling him on each occasion that they could not sell him under the circumstances until they had permission

from New York to do so, they did finally take an application from him in July 1935. Lawing testified that after taking his application, Willingham and Mock told him that they had heard nothing more from New York regarding it and as soon as they did, they would notify him. His application was finally returned, unapproved, on December 5, 1935, with a letter which gave no reason for the rejection. Loew's 1935-36 product was licensed to Crescent on December 26, 1935, for first run exhibition in Brownsville, and at approximately the same time Loew's licensed that season's product to Crescent for exhibition in 16 other towns (Ex. 334) Crescent paid Loew's $40,006.08 for exhibiting its 1935-36 product, (Ex. 337a).

44. On April 3, 1935, Sudekum told Avey, Loew's Atlanta exchange manager, that he expected to make a deal with Loew's for its 1935-36 product, and asked him to advise Kessnich, the southern district manager, that Crescent wanted Loew's product for Brownsville (Ex. 175). Prior to July 2, 1935 Miss Brockett, the Crescent booker, told Willingham that Sudekum wanted Loew's to hold its 1935-36 product for the new Crescent theatre in Brownsville, and it was because of this request that Willingham refrained from negotiating with Lawing for that product until July 1935. Early in July 1935, Kessnich, after discussing the [fol. 3077] matter with Willingham, directed him to sell Loew's 1935-36 product to Lawing. Willingham then accepted Lawing's application and submitted it to Kessnich on July 30, 1935, with the recommendation that it be approved, because according to Willingham, it was very much to the company's advantage to continue doing business with Lawing. On the same date, (July 30, 1935,) Willingham wrote Connors, Loew's eastern and southern salesmanager, concerning the acceptance of the Lawing application as follows:

> "*Brownsville, Tenn. Southland Theatre.* Mr. Mock secured a deal in this situation several weeks ago which the writer rejected. Went back into the town and improved the deal, so that it is acceptable, placing six pictures in the top bracket instead of three and secured a slight increase on the lower bracket pictures. This deal is being forwarded you with special recommendation as Brownsville is a Tony Sudekum town. Mr. Lawing

has been buying our product for years and Mr. Sudekum came into his town and built an opposition house. In as much as he was in the town first and has always played our product, we believe it nothing but right that we continue to serve him. However, wish to go on record now that if anything comes up with reference to selling the balance of the Sudekum towns that I will not be held responsible for the selling of this contract. In the event you do not think we have used good judgment, please reject the deal. We might add Mr. Kessnich on his last visit to Memphis, told us to go ahead and sell this contract as Mr. Lawing was entitled to our product. (Ex. 166)."

On August 1, 1935, Harold Postman, Loew's contract clerk in the New York Office, wrote Willingham, acknowledging receipt of the Lawing application and stating that Kessnich had suggested that action on the application be withheld for a few days (Ex. 172). On August 20, 1935, Postman again wrote Willingham, returning, unapproved, the Lawing application with the explanation that Kessnich had suggested that Willingham hold the application on his desk until they knew whether or not they were going to make a deal with Crescent (Ex. 173). On November 26, 1935, Willingham sent the Lawing application back to Kessnich with the suggestion that in dealing with Sudekum he compare what Sudekum would pay with what Lawing was willing to pay for the 1935-36 product, (Ex. 168).

On December 5, 1935, the same day that Lawing's appli- [fol. 3078] cation was rejected, Willingham wrote Sudekum that Metro had taken its product away from its old customer in Brownsville to give it to Crescent and it, therefore, deserved to have its pictures played in all of the Crescent towns (Ex. 46).

On January 22, 1936, Willingham wrote Postman with reference to a deal with Lawing for his Strand Theatre at Whiteville, Tennessee, as follows:

"As you know, this exhibitor operates the Southland Theatre, Brownsville, Tennessee. He has been using our product in Brownsville ever since he has been in business and paid excellent rentals. However, we refused to sell him the 1935-36 product in Brownsville this season because Mr. Tony Sudekum has opened a

theatre in Brownsville and we had to sell our product to Mr. Sudekum." (Ex. 167).

Connors took the stand for the defendants and undertook to explain this sell-away. When asked why he overruled Willingham's recommendation that the 1935-36 product be licensed to Lawing in Brownsville, he answered that Willingham had advised him that Lawing claimed he could not pay as much for the 1935-36 product as he had previously been paying (referring to Willingham's letter of May 28, 1935, which was introduced as Def. Ex. 51), and that Lawing's application called for less money than he felt Loew's product was worth in Brownsville. This could not possibly have been Connor's reason for rejecting Lawing's application, however, because, first, there is nothing to show that Connors ever told anyone Lawing's offer was inadequate, and second, Lawing's offer, as a matter of fact, was as good as, if not better than, the deal Loew's accepted from Crescent. Connors further explained, in justification for his decision overruling Willingham's recommendation, that he new that Lawing's theatre was not as modern as the new Crescent Theatre, and he felt that Metro could get more money from the new theatre. This was also an afterthought, as there is no suggestion in the voluminous correspondence regarding this situation introduced in evidence by both sides that the relative merits of the theatres entered into his decision, nor was there any necessity for [fol. 3079] Connors to speculate about what he could get from the two theatres because he had both offers before him, and by the simple process of comparing the two offers, he would have ascertained that from the standpoint of Loew's, the Lawing deal was as good as, if not better than, the Crescent offer.

45. In replying to Willingham's letter of May 28, 1935, (Def. Ex. 51), which advised Connors of Lawing's statement that he could not pay as much for Metro product as he had the previous year because of the competition with which he was faced, Connors suggested that it might be advisable to sell Crescent, if Willingham was unable to secure a satisfactory deal from Lawing. He further suggested that Willingham and Kessnich jointly decide to which theatre the product should be licensed (Def. Ex. 52). Kessnich subsequently instructed Willingham to sell the

product to Lawing (Exs. 164 and 166). Connors gave no explanation of why this decision to sell Lawing, made after the newer and better Crescent Theatre was already in Brownsville, was later reversed. Nor was Kessnich called to explain why, after directing Willingham to sell Lawing early in July, 1935, he directed Postman on August 1, 1935, to withhold action on Lawing's application, and on August 20, 1935, to return Lawing's application, unapproved, to Willingham.

Willingham also testified, but did not undertake to support the reasons advanced by Connors for not selling Lawing. On redirect examination, he admitted that he wrote Kessnich on July 1, 1936, (just after Lawing had sold out to Sudekum and the controversy as to which theatre to sell had been finally terminated, and three years before the controversy generated by this law suit started), as follows:

> "I know Mr. Lawing personally and know this is the party Mr. Sudekum sat down on top of in Brownsville, Tennessee, and finally ran him out of town. Mr. Lawing is a very good theatre operator, but cannot buck such opposition as Sudekum."

Thus, as far as the disposition of Loew's 1935-36 product [fol. 3080] in Brownsville, Tennessee, is concerned, the record shows that it was licensed to Crescent although Lawing offered Loew's at least as good a deal as the Crescent deal and was Loew's old customer in Brownsville.

46. Crescent eliminated all theatre competition in both Paris and Brownsville by acquiring Lawing's theatres in both towns, in April 1936, at a figure which represented the value of Lawing's equipment and improvements to the buildings. Immediately after acquiring them Crescent closed both theatres.

Before purchasing his theatres, Crescent required Lawing to agree that he would not operate a theatre for a period of five years in any town in Tennessee, Alabama, and Kentucky in which Crescent or any of its subsidiaries then owned theatres.

47. In 1932, E. W. Dozier, who owned half of the capital stock of the Capital Amusement Company, owner and operator of the Capitol Theatre in Madisonville, Kentucky sold his stock to Crescent, which already owned the other

half of the stock, and the charter of the Capitol Amusement Company was thereupon surrendered and the theatre transferred to Crescent. Dozier agreed not to go into the theatre business in Madisonville, Kentucky, for a period of ten years. Madisonville, Kentucky, according to the 1940 census, has a population of 8209. It is three or four miles from Earlington, Kentucky, which, according to the 1940 census, has a population of 2858. The population of those two towns, according to the 1930 census, was 6908 and 2309, respectively. Shortly after making the sale, E. W. Dozier, opened up a theatre in Earlington known as the Roxy. A theatre had previously been operated in this building, but it had been closed for some time. Dozier operated the Roxy Theatre from May 12, 1932 until August 1, 1939 when he sold it to Crescent. In the meantime, Crescent had built, (at a cost, including equipment, of over $23,000.00) a new up-to-date theatre in Earlington known as the Earl, which was opened in April 1937. This theatre was erected after [fol. 3081] Dozier had come to Nashville and interested Rockwood in leasing the Roxy Theatre for a ten-year period at a monthly rental of $185.00 (his basic rent was $35.00), but had backed out of the deal for the reason, as Dozier testified, that he did not like Rockwood's financial statement.

In the fall of 1936, Dozier heard rumors that Crescent intended to open a theatre in Earlington. Earlington was not big enough for two theatres, and because he feared that he would be unable to survive against Crescent competition, Dozier offered to sell his theatre to Crescent if they were determined to enter Earlington. Shortly thereafter Stengel offered to lease the Roxy Theatre and told Dozier that unless he agreed to lease his theatre to Rockwood, Crescent would buy a lot and build a theatre. In December 1936, Stengel threatened to build a theatre in Earlington and put Dozier out of business unless he leased his theatre to Rockwood. Dozier refused to lease his theatre to Rockwood, and Crescent built a theatre in Earlington, (The Earl) which opened in April 1937.

48. During the 1933-34 and 1934-35 seasons, Crescent did not license Paramount products and Dozier played Paramount pictures ahead of Madisonville. In April 1935, Dozier entered into a contract for Paramount's 1935-36 product which provided that Dozier was to have clearance

over Madisonville, but the length of the clearance was to be decided by the N. R. A. Clearance Board at Indianapolis.

On August 22, 1935, Paramount licensed its 1935-36 product to Crescent for Madisonville with clearance over Earlington, provided Madisonville played within 60 days of national release. This was the same date on which Paramount licensed its 1935-36 product to Crescent for Brownsville and Paris and 16 other situations. (Ex. 263)

Dozier was not consulted by Paramount about its contract with Crescent giving Madisonville clearance over Earlington, although it was in direct conflict with his agreement with Paramount. He had heard, however, that Crescent had made a deal with Paramount for the 1935-36 product in Madisonville with clearance over Earlington [fol. 3082] and wrote Charles Reagan, Paramount's western district sales manager and to the Paramount exchange in Indianapolis to find out what, if anything, had happened. Dozier was especially alarmed because Madisonville had played one 1935-36 release "Every Night at Eight" September 11 and 12, when he had it booked for September 14, 15, and 16) and Madisonville had also played two short subjects ahead of Earlington. Finally, on September 23, J. T. Howard, Paramount exchange manager at Indianapolis, wrote Dozier that the Atlanta office had sold Madisonville and that the first he knew of it was when he received word from the home office.

In December 1935, Paramount entered into a "superceding contract" with Dozier for its 1935-36 product reducing the film rentals called for by the contract dated April 3, 1935, (Ex. P. 16) approximately 75 per cent. At the time the "superceding contract" was negotiated, Duff Newman, a Paramount salesman, told Dozier he was being allowed the reduction because of the difference in the value of pictures to him after Paramount had sold Madisonville first run.

On October 14, 1935, Howard wrote David Prince, Paramount Atlanta exchange manager, concerning this sell-away and stated that Dozier had been banking on Paramount product as the backbone of his business, that he had been a very splendid account, and that the Earlington deal for the 1935-36 product totalled more money than the Madisonville deal would. Prince answered this letter on October 16, 1935, calling to Howard's attention the fact that although the business Howard got out of Madisonville did not com-

pare favorably with what he got out of Earlington, the Sudekum business involved some $40,000.00, or $45,000.00, for the Atlanta exchange and the company got a lot more money in the long run.

On September 20, 1935, Howard wrote Reagan, his superior, complaining about giving Madisonville clearance over Earlington on the 1935-36 product. He pointed out that it [fol. 3083] was unjust to give Madisonville clearance over Earlington because the total revenue on the S-7 (1935-36) deal for Madisonville was $1,590.00, whereas the Earlington total was $1,660.00. Further the Earlington short subject prices were from 50 cents to $2.50 per subject higher in the Earlington deal than in the Madisonville one (Ex. 160). Reagan answered Howard's letter on September 24, 1935, as follows (Ex. 196):

"DEAR MR. HOWARD:

This will acknowledge receipt of your letter of September 20th, regarding Madisonville and Earlington, Kentucky.

If Madisonville were the only town involved in the Sudekum deal I agree with you that they would not be entitled to any protection over Earlington. However that is not the case. We have finally been successful in closing a deal with the Sudekum Circuit, which we have been unable to sell for a number of years because of an old argument the Theatre Department had with Mr. Sudekum: but, since there is much more involved than just Madisonville, the Company is desirous of securing the film rental we have not had for several years from the Sudekum towns, and it was necessary to include in the Madisonville deal the Earlington protection."

Paramount was out of the Crescent towns again for the 1936-37 season (Ex. 264) but Dozier's Paramount contract for the 1936-37 season provided that if Paramount should sell Madisonville, the contract was to be superseded and his film rentals reduced. Dozier told the Paramount salesman (Duff Newman) that he wanted a contract with clearance over Madisonville, but Newman refused to sell him such a contract, or even discuss terms with him, and told him that if Paramount did not sell Madisonville, he would play ahead of it, but that if they did sell Madisonville, he would have

to play after that town, in which event his film rentals would be reduced.

The next season (1937-38) Dozier was able to make a contract with Paramount on July 16, 1937, which gave him clearance over Madisonville without any qualification, as it then appeared that Paramount would be out of the [fol. 3084] Crescent towns again during that season. In the fall of 1937 negotiations commenced between Paramount and Crescent on a long-term franchise, and on October 1, 1937, O. A. Morgan, Paramount southern district manager, wrote to E. J. Barnard, Paramount Indianapolis exchange manager, advising him not to do anything about the 1938-39 deal for Earlington without consulting Reagan, because although Sudekum was satisfied to permit Paramount to perform its contract with Dozier for the 1937-38 season, they did not want to do anything to interfere with their negotiations with Sudekum during the next four seasons.

In the spring of 1938 Dozier spoke to Barnard and told him he wanted to license Paramount's 1938-39 product on a run ahead of Madisonville as he had in 1937-38. Barnard told him that they had sold Crescent a franchise and the only way they could sell him for the 1938-39 season was after Madisonville. This franchise, dated July 28, 1938, as of November 1, 1937, gave Crescent's Madisonville Theatre fourteen days' clearance over Earlington commencing with the 1938-39 product. Dozier's Paramount contract for the 1938-39 season accordingly provided that he was to play fourteen days after Madisonville. He was given no opportunity to even negotiate for the playing position which he had in the 1936-37 and 1937-38 seasons.

Paramount had refused to give Dozier a franchise in 1937. In February 1937, Barnard advised Dozier, in response to his inquiry, that Paramount did not look favorably upon franchises as a matter of policy, but that he would communicate with his home office (Ex. 57). Later, on March 2, 1937, Barnard wrote Dozier that the home office as a matter of policy did not wish to enter into a franchise in a situation the size of Earlington (Ex. 59). Despite this stated Paramount policy, the franchise which Paramount entered into with Rockwood covers twenty-three towns which are smaller than Earlington. (Ex. P. 30.)

49. Prior to January 1936, Dozier spoke to either Mr.

that they didn't know whether they were going to get to-
[fol. 3085] gether with Crescent on a 1935-36 deal and in the event they did not, Dozier could negotiate for that product. Shortly after January 1, 1936, Dozier went to Indianapolis and saw George Landis, Fox branch manager, who sold him the 1935-36 Fox product. At that time, Fox had not made a deal with Crescent, and did not make a deal for any 1935-36 product until April 1936, when a franchise was negotiated covering the 1936-37, 1937-38, and 1938-39 seasons (Ex. 13, F. 10). The 1936-37 season's product was then licensed to Crescent without giving Dozier an opportunity to negotiate for it.

50. Dozier sold his theatre to Crescent in August 1939 because, with the loss of his run on Paramount pictures, he was unable to secure a sufficient number of good pictures on a run ahead of Madisonville to make his operation profitable. The price at which Dozier sold the Roxy Theatre to Crescent represented only the value of the equipment and improvements to the theatre. Sudekum refused to buy the Roxy unless Dozier also sold Crescent the Alhambra Theatre in Hopkinsville, which Dozier owned and had been renting to Crescent, and the Alhambra was, therefore sold to Crescent as a part of the same deal. Crescent required Dozier to agree that he would not compete with it or any of its affiliates in any of their towns for a period of ten years.

Immediately after acquiring the Roxy Theatre, Crescent closed the Earl Theatre and later reopened the Earl and closed the Roxy. Only one theatre has been operated in Earlington since Crescent's acquisition of the Roxy.

51. William P. Miller operated the Palace Theatre in Rogersville, Tennessee, from 1917 to 1938. The town has never been large enough for two theatres; nevertheless in October 1936, Cumberland opened the Rogersville Theatre in opposition to Miller's Palace Theatre.

Miller had been operating the Palace Theatre on a 10 and 25-cent admission policy; after a short while, the Rogersville Theatre commenced to double feature on Saturday and
[fol. 3086] to operate 10-cent nights, and later the Rogersville cut its Saturday prices for both matinee and evening performances to 10 cents.

52. In the 1934-35 season Miller played 15 out of 22 United Artists releases, and in the 1935-36 season he played

On July 1, 1936, Miller offered in writing to license twenty-seven of the 1936-37 United Artists releases at a total rental of $486.00, (Ex. 66). The United Artists salesman who took this offer, (Crosswell) submitted it to his company with a recommendation stating that the exhibitor had been a satisfactory account in the past, that he had played off promptly and was financially responsible (Ex. 220). On July 30, 1936, Richardson, United Artists branch manager at Atlanta, wrote Miller rejecting his offer and giving as the reason, that the rentals by Miller were not high enough. (Ex. 67).

On August 27, 1936, Miller wrote the United Artists exchange at Atlanta calling to their attention the fact that their salesman had failed to call on him after the rejection of his offer of July 1, and notifying them that he was interested in licensing United Artists' 1936-37 product. (Ex. 68). United Artists' answer to this letter dated September 9, 1936, stated that they were not in a position to negotiate with Miller for Rogersville, and, therefore, there was no necessity for sending a salesman to see him. (Ex. 69). The unwillingness of United Artists to continue doing business with Miller is explained by the report of J. Emenheiser, salesman in the United Artists exchange in Atlanta, concerning his negotiations with Cumberland. This report, dated September 16, 1936, reads as follows (Ex. 221):

> "In Rogersville Hill has opened a new theatre and we will have to play with Hill because this is the only spot of his entire fifteen towns where there is any opposition at all, and Hill has demanded that we approve all contracts or none."

[fol. 3067] It was further explained by Richardson, himself, who, when called by the defendants and examined as to the reasons why United Artists licensed its 1936-37 product to the Rogersville Theatre, testified in substance that this was done so that it could make a deal with Cumberland for the other towns in which that circuit operated. In determining who should get the product in Rogersville, he testified that he compared what Miller offered for Rogersville with the amount of the Cumberland circuit deal (in the neighborhood of $11,000.00), and decided that the product should be licensed to Cumberland in Rogersville; at the same time United Artists licensed its 1936-37 product to Cumberland for all of the towns in which it operated.

When the 1937-38 buying season came around, Miller tried again to negotiate for United Artists. On August 14, 1937, he wrote United Artists reviewing his experience the previous season in losing United Artists product and offering to license the 1937-38 product on the following basis: 12 pictures at $40.00 against 40 per cent of the gross and 12 pictures at $26.00 and the remainder at $13.00 with a score charge of $3.00 per picture (Ex. 71,). In spite of this offer, United Artists licensed its 1937-38 pictures to the Rogersville Theatre on October 15, 1937, on the following terms: 13 at $32.50, 2 at $27.50, 2 at $25.00, 1 at $20.00, 2 at $17.50 (Ex. U. A. 1).

On August 19, 1937, Prince, United Artists Atlanta exchange manager, wrote his salesman, Barnes about the offer that Miller had made for the 1937-38 product and advised Barnes as follows: (Ex. 222,).

> "I am attaching a copy of a letter I am writing to W. P. Miller of Rogersville, Tennessee.

In Miller's letter he writes in part as follows:

> "If United Artists product is open for 1937-38, I would like to try to make a deal with you for them. I can offer you without knowing what you will have, the following deal: 12 pictures at $40.00 plus $3.00 recording charge against 40% of the gross receipts, 12 pictures at $26.00 plus $3.00 recording charge and the remainder at $13.00 plus $3.00 recording charge.
>
> [fol. 3088] "If you can make a deal with Hill of Tullahoma for the Cumberland Amusement Company houses and leave out Rogersville, we will really be better off. However, if it can't be done that way, then I would like to see the deal from Hill including all the Hill situations."

On September 28, 1937, Prince again wrote Barnes to the effect that another salesman, Lynn Dunn, had taken applications from Cumberland for Rogersville, but stated that the film rentals called for by the deal were not nearly as high as those offered by Miller and that he would, therefore, hold up the application until Barnes was able to make a deal for the whole circuit, (Ex. 223).

Prince, when called by the defendants to explain this transaction, testified that he accepted the Cumberland deal for Rogersville rather than Miller's offer because he felt

that the latter offer was made in a desperate attempt to get pictures and was so high that Miller would have been unable to perform it. Miller realized when he wrote United Artists there was little chance of his offer being accepted and consequently offered a larger price for the seasons product than he would have under other circumstances. Miller regarded his letter as a bait and not a bona fide business proposition.

53. Miller played Fox pictures in the 1934-35 and 1935-36 seasons. Fox sold Miller its 1936-37 product for a theatre he operated in Sneedville, where there was no opposition, and at that time the Fox representative told Miller he did not believe he could offer him their product for Rogersville, as, if they sold him there, they might lose the business of quite a few theatres. After this conversation, Miller went to the Fox exchange in Atlanta, but was not offered any pictures. On October 3, 1936, Paul Wilson, Fox Atlanta exchange manager, wrote Miller that on a previous trip into east Tennessee, the Fox salesman, Fairchild, had tried to get Rogersville to tell Miller they were negotiating with the Hill circuit on the 1936-37 product, and that since then they had made a deal with that circuit. Fox sold Miller its 1937-38 product on November 20, 1937, as it did not make a deal with Cumberland on the 1937-38 product until April 1, 1938, (Ex. 15) four months after Cumberland had transferred the theatre to Rockwood.

[fol. 3989] 54. Miller played the Warner 1936-37 product and on May 29, 1937, signed an application for Warner's 1937-38 product. He did not hear anything further from Warner, and on September 3, 1937, wrote their Atlanta exchange asking what had happened to his application, and was advised on September 6, 1937, by the branch manager, Vetgesslich, that it had been rejected, as Warner "had made a deal with the entire Sudekum Circuit, which covers your town." After Miller submitted this application, he was never requested by any representative of Warner to increase the prices called for by his offer.

An examination of Miller's application for the Warner 1937-38 product shows that it called for a total guaranteed rental on feature pictures which was $35.00 less than the rental called for by the Cumberland contract. However, it called for 18 pictures at a percentage against a guarantee, and if these pictures had paid anything above the

guarantee, the contract would have equaled or exceeded the Cumberland deal.

55. In April 1937, Miller commenced writing to RKO requesting an opportunity to negotiate for the licensing of their 1937-38 product. Salley, an RKO salesman employed in Atlanta, called on Miller sometime after July 1937, and offered to license one-half of RKO's 1937-38 product to him. Salley's excuse for not offering Miller all the product was that to do so would knock RKO out of a deal where they would make more money. Miller was then playing RKO pictures in Rogersville and had exhibited RKO pictures for some time.

Salley, when called by the defense to give his version of the negotiations, attempted to give the impression that it was entirely satisfactory with Miller for RKO to license half of its product to the Rogersville theatre, and that as a matter of fact, Miller was happy to be able to license only half the RKO product, instead of all of it as he had in previous seasons. Under the circumstances Miller no doubt was very glad to get half of the RKO product which was better than he had been able to do with most of the other distributors, and it is clear that Miller agreed to take half the RKO product only because Salley told him that that was all he could have. Miller tried to buy all of the product, but [fol. 3090] Salley told him that one-half was the "best he could do." Further, Salley's salesman's report for September 24, 1937, indicates that half of its product was all RKO was willing to license to Miller. It read as follows:

> "Referring to Mr. Miller, Rogersville, Tennessee, Called here enroute and Miller very anxious to close with for new product. Account of Hill Circuit being opposition will probably split product between two houses. Will definitely close."

56. Miller licensed Universal's 1936-37 product on April 2, 1937. On July 28, 1937, Cumberland licensed Universal's 1937-38 product for all of its situations (Ex. 9).

57. In 1937, Potts, the Crescent manager in Morristown, contacted Miller in Rogersville and told him that the town was too small for two theatres and advised him to make a deal with Cumberland. He suggested that if Miller wrote him a letter setting forth a proposition, he would forward

it to Sudekum. During July or August 1938, Castleberry called on Miller and suggested that he sell his theatre to Rockwood. Miller told him that he was willing to sell. One of the principal reasons for Miller's willingness to sell his theatre was the difficulty he encountered as well as difficulty he anticipated, in securing suitable pictures for exhibition in his theatre. In August 1938 Stengel and Baulch called on Miller, and an agreement for the sale of the Palace Theatre to Rockwood and Miller's employment as manager of the Rogersville Theatre was reached. As soon as Rockwood acquired the Palace Theatre, they closed it, and only one theatre has been operated in Rogersville since that time.

58. Y. D. Moore had operated the McKenzie Theatre at McKenzie since 1929. About 1935, Castleberry told him that Crescent contemplated some expansion in that part of the state, and might be interested in McKenzie. Castleberry stated that when Crescent "came into a situation they preferred to purchase the interest of the exhibitor that was there," and that a man in Brownsville who refused to sell had later sold for less "than he had been offered."

In the early part of 1936, Stengel told Moore that because of his personal friendship with Moore's brother, he would forget McKenzie as a theatre possibility if Moore would keep them advised of any threatened competition in [fol. 3091] that territory. Moore then spent $8,000.00 in improving his theatre.

In March 1939, Moore learned that Stengel had leased a building in McKenzie and immediately went to Nashville to see him. He made a deal with Stengel, subject to acceptance by Mr. Sudekum, for $9,200.00, which represented the value of the theatre equipment and lease, with nothing for goodwill or the business itself.

Rockwood operated Moore's theatre for two years and then opened a new theatre. This new theatre was not built on the property Rockwood had leased just prior to taking over Moore's theatre, because, as Stengel testified, that property was not deep enough for theatre purposes.

59. McKenzie and Huntingdon are eleven miles apart. The former had a 1940 population of 2,000, the latter a 1940 population of 1,432. The Court Theatre in Hunting-

don was transferred from Strand to Rockwood in January 1937. On July 14, 1937, Moore bought the Paramount 1937-38 product with clearance over Huntingdon, the same as he had in previous seasons. On August 19, 1938, Morgan wrote Stengel stating that Paramount had granted McKenzie clearance over Huntingdon on July 14, 1937, which was before Stengel ever discussed giving Huntingdon protection over McKenzie with Morgan, and therefore there was nothing that Paramount could do on the 1937-38 product. But the next four years' product was licensed to Huntingdon with clearance over McKenzie under the franchise between Rockwood and Paramount, dated July 28, 1938, as of November 1, 1937, and Moore was not given an opportunity to negotiate for the run he had formerly enjoyed.

A comparison of the Moore Paramount deal for the 1937-38 season, when he had clearance over Huntingdon, with the Huntingdon deals for 1937-38 and 1938-39, shows that Paramount could not have reversed the runs in these two towns because it was getting more money out of Huntingdon.

1937-38		1938-39	
McKenzie (Ex. P. 39)		McKenzie (Ex. P. 10)	
5 at $28 vs 40%		5 at $28	) Score
8 at $28	) Score	8 at $18	) $3 per
8 at $22	) $3 per	27 at $10	) picture
Balance at $10	) Picture		
Huntingdon (Ex. P. 29)		Huntingdon (Ex. P. 29)	
4 at 40%	) Score	4 at 40%	) Score
8 at $12	) $1.50	8 at $13.50	) $1.50
10 at $10	) per	10 at $12.50	) per
18 at $8	) picture	18 at $ 8.00	) picture

[fol. 3092] The total amount of the McKenzie 1937-38 deal on the flat rental pictures was $652.00, plus $120.00 score charge, or $772.00, while the Huntington 1938-39 total on flat rental pictures was only $377.00, plus $54.00 score charge, or $431.00.

The Huntington deal for the 1938-39 season was only $37.00 higher than the 1937-38 deal when it did not have clearance over McKenzie, and this increase was not in payment for the switch in runs because it represented the identical season-to-season increase called for by the franchise in other Rockwood situations where no change in clearance was involved. Insofar as Huntington and McKenzie are

concerned, Paramount lost money by switching the runs. Why then did the change occur? This is answered by Morgan's letter to Unger, Paramount's southern division sales manager, on August 6, 1938, in which he said:

> "With further reference to your letter of July 28, regarding the letter that Mr. Y. D. Moore, of McKenzie, Tennessee, wrote to Mr. Agnew. I have discussed the matter several times with Mr. Sudekum, and he insists that Huntington have protection over McKenzie."

60. J. A. Taylor owned the Piedmont Theatre at Spruce Pine, North Carolina. It was operated by R. H. Gutschalk until June 12, 1937, at which time Taylor commenced to operate the theatre itself. In 1936 Taylor met Fred Gorman of Cherokee who stated that he was affiliated with Sudekum, and that unless they could buy Taylor's theatre, they would build a theatre in Spruce Pine, which they could afford to operate at a loss for five years if necessary. Gor- [fol. 3093] man warned Taylor that he represented a big Company with big buying power and that they could buy film cheaper and operate cheaper than he could.

About thirty days later Gorman came back and told Taylor that they were definitely going to build a theatre in Spruce Pine, unless Taylor would sell his theatre to them, and on this occasion he repeated in substance the threats he had previously made. He also showed Taylor an agreement they had with Gutschalk to buy the remainder of his lease, and said that before the lease expired they could build a new theatre and close the Piedmont. Taylor refused to sell his theatre and said that if they attempted to operate the Piedmont under Gutschalk's lease, he would declare the lease in default.

Cherokee proceeded to build a new theatre which it opened in December 1937. About three days after the Cherokee Theatre (Carolina) was opened, Taylor called upon Gorman at Erwin, Tennessee, and offered to sell him the Piedmont Theatre. Cherokee purchased Taylor's equipment for $4,000.00, which was the amount he had spent in remodeling the theatre when he took it over from Gutschalk. The bill of sale dated December 21, 1937, contains a provision that Taylor will not re-enter the theatre business in Mitchell County, North Carolina, for a period of ten years (ex. 22).

61. Taylor's Piedmont Theatre in Spruce Pine, North Carolina, licensed Paramount Pictures for both the 1936-37 and 1937-38 seasons.

In negotiating the Rockwood franchise in the fall of 1937, Paramount did not include Spruce Pine as far as its 1937-38 product was concerned because that product had already been licensed to and was then being played by Taylor. It did agree, however, to take its product away from Taylor commencing with the 1938-39 season and to include Spruce Pine in the Rockwood franchise for the last four seasons. Paramount agreed to this without giving the Piedmont Theatre an opportunity to negotiate for the product, although the Piedmont Theatre was then its old customer in Spruce Pine, and whether an exhibitor had played Paramount pictures in the past is one of the factors Para- [fol. 3094] mount considers in determining to which exhibitor in a competitive situation the company should license its product. When Paramount agreed to include Spruce Pine in the last four seasons of the Rockwood franchise, Cherokee was not then operating a theatre in the town. It is clear, therefore, that the agreement to include Spruce Pine was made prior to the time that Taylor sold out, as that sale did not occur until after the Carolina was opened.

62. In June 1937 Andy Anderson, F. M. May and Cecil Taylor opened the Kentucky Theatre in Hopkinsville, Kentucky. A theatre had been operated by Crescent prior to 1930 in the building in which the Kentucky was located. Before opening the Kentucky Theatre, Anderson and his associates remodeled the entire building and reequipped the theatre at a cost of $15,000.00. At the time they opened the Kentucky Theatre, Crescent operated two other houses in Hopkinsville—the Alhambra, which had 900 seats, and the Princess, which had from 500 to 600 seats.

Before the Kentucky opened, the Alhambra charged 35 cents for some pictures on Sunday and Monday, and 25 cents the rest of the time. The Princess charged 15 and 20 cents. After the Kentucky opened, Crescent cut its admission prices and thereafter pursued no steady admission-price policy—its prices varied from week to week and even from day to day. The Alhambra ran several Metro pictures at a matinee admission price of 20 cents and an evening price of 25 cents, but on a two-for-one basis, which

made the matinee admission 10 cents and the evening 12½ cents per person. It also played some Warner pictures at a matinee price of 14 cents and an evening price of 23 cents, but on a two-for-one policy. The Kentucky opened at an admission price of 25 cents, which was not varied except that it was increased on big pictures.

63. Anderson was able to get Paramount's 1936-37 product first-run in Hopkinsville, because Crescent did not make a deal with Paramount for the 1936-37 season. On October [fol. 3095] 7, 1937, Anderson wrote Paramount offering to negotiate for its 1937-38 product for first-run exhibition in Hopkinsville. On October 11, 1937, L. C. Lowe, (Paramount salesman) wrote Anderson in response to his request that Paramount product was not available to him because they had made a deal with Sudekum for his circuit. On October 12, 1937, Anderson wired Paramount asking whether its second-run product was available. On October 14, 1937, Cecil House, Atlanta branch manager for Paramount, wrote Anderson in answer to his wire that they were unable to offer second-run service to him.

The deal with Sudekum referred to by Lowe, was the franchise dated July 28, 1938, as of November 1, 1937. Clause 8(e) of that franchise gave Crescent the option of playing an additional or repeat run on any picture it played first-run in Hopkinsville and all of the other towns outside Nashville where a first run was licensed. By this option Crescent was able to prevent Anderson from obtaining any second-run feature although it made no commitment to use them itself.

During the 1937-38 season, Crescent played several Paramount pictures second run in Hopkinsville under this option, and in the Paramount memoranda justifying these bookings, the branch manager, House, referred to this option as a second-run option.

64. On October 13, 1937, Anderson wired Loew's inquiring whether its 1937-38 product was available for Hopkinsville first or second run. The wire was acknowledged on that date by the secretary to Avey, Loew's Atlanta exchange manager, who stated the telegram would be brought to Avey's attention upon his return to Atlanta. Loew's made no deal with Crescent for Hopkinsville until November 23, 1937, (Ex. 336) and Anderson heard nothing more from Avey until November 30, 1937, when in response to

Anderson's letter of November 29, 1937, requesting an answer to his previous wire, Avey wrote that Loew's first-run product had already been sold in Hopkinsville (Exs. 109 and 110). On December 1, 1937, Anderson wrote Avey asking if second-run product was available, (Ex. 111). [fol. 3096] Anderson received no answer to this inquiry and on December 24, 1937, wrote Loew's again, asking about second-run product, (Ex. 112). On December 29, 1937, Avey replied to this letter that a Loew's salesman, C. F. McGuire, would call upon Anderson shortly after the first of the year (Ex. 113). At about the end of January, 1938, McGuire did call upon Anderson in Hopkinsville, but he said that he had just driven up from Nashville and didn't know anything about the Hopkinsville situation and, therefore, could not quote any figures or talk about any contracts.

On February 11, 1938, Anderson again wrote Avey requesting information as to what Loew's had decided with regard to his request for a second-run contract, (Ex. 114). On February 16, 1938, Avey replied that McGuire had advised him that Anderson had more product under contract than he had playing time for and that the prices he could afford to pay would barely cover the handling charge of the films (Ex. 115). This was immediately denied by Anderson in a letter to Avey of February 17, advising him that the Kentucky Theatre did not have enough product to last until the end of the year, and that McGuire had quoted him no prices (Ex. 116).

On March 11, 1938, Anderson wrote Avey asking for a reply to his letter of February 17, 1938 (Ex. 117). On March 12, 1938, Avey wrote Anderson that he had just returned from his vacation and had found Anderson's letter of February 17 and that in view of the circumstances, he thought it advisable for McGuire or himself to again call on Anderson (Ex. 118).

In April 1938, Avey came to Hopkinsville to see Anderson. The latter wanted to buy the 1937-38 second-run but Avey told him that they would not let him have that unless he first played the 1936-37 product second-run, and Anderson thereupon signed a contract for those 1936-37 Loew's pictures which had not already played a second-run in Hopkinsville.

On May 4, 1938, Anderson wrote Avey calling to his at-
[fol. 3097] tention the fact that Crescent was exhibiting Metro pictures at the Alhambra at 25 cents on a two-for-one policy, which made the admission actually 12½ cents (Ex. 120). Avey replied thanking Anderson for calling this to his attention (Ex. 121). Nevertheless, Crescent did not discontinue its cut-rate admission policy on Loew's pictures after the receipt of Anderson's letter. This was in spite of the fact that Anderson's contract with Loew's for the 1936-37 product second-run called for a minimum evening adult admission price of 25 cents (Ex. L. 15), which he maintained.

65. Schrader, a salesman from the Indianapolis office sold Anderson a second-run of Warner's 1937-38 product. He later tried to get Anderson to release this product to Sudekum because he said Sudekum had bought it out of Atlanta, but Anderson refused to do so. On October 17, 1938, Anderson wrote Dave Alterman, a Warner salesman at Atlanta, and asked him if the 1938-39 product would be available for a second-run. He never received an answer to that letter, nor was he ever offered Warner's 1938-39 product for second-run exhibition at Hopkinsville.

66. On November 29, 1937, Anderson wrote the RKO exchange in Indianapolis, inquiring whether any of its product was available first or second-run (Ex. 137). On December 4, 1937, RKO wrote Anderson in reply that its product in Hopkinsville was sold first and second-run to Sudekum (Ex. 138). On that date, only nine RKO 1937-38 features had been licensed to Crescent for a second-run showing. Eight more were not licensed by Crescent until the year 1938 and the other 33 features released by RKO during the 1937-38 season were never exhibited second-run in Hopkinsville (Ex. RKO 4).

In November 1938 Anderson, May and Taylor sold the Kentucky Theatre to Crescent for $15,000.00. The sales agreement provided that Crescent and Anderson would not open a theatre in any town in which the other was directly or indirectly interested for a period of ten years.

Crescent closed the Kentucky Theatre as soon as it acquired the house.

[fol. 3098] 67. Tim Smith opened the Palace Theatre in Morristown, Tennessee, on March 26, 1937. Sudekum's

Morristown manager, (Potts) fought the repeal of a building ordinance which prevented the use of the building Smith was going into for theatrical purposes. Potts also attempted to get Sudekum to arrange to have the state fire marshal declare the building unsafe for theatrical purposes unless certain expensive improvements were made, but there is nothing in the record to show that Sudekum complied with this request. Potts also suggested an attempt be made to secure a lease on the building Smith was planning to use.

Shortly after Smith commenced to build his theatre in Morristown, and on several occasions thereafter, he was approached by Castleberry and Thomas, another Crescent employee, who suggested that he sell out to Crescent.

At the time the Palace Theatre was opened, Crescent was operating only one theatre in Morristown, the Princess. Crescent opened a second theatre—The Ritz—in August, 1928, although prior to that time Sudekum had told Smith that he did not believe that either Morristown or Harriman was large enough for two theatres. Smith had been operating the Palace on a 20 cent admission price. Crescent opened the Ritz at a 15 cent admission price, and Smith closed the Palace four months after the Ritz opened.

68. Smith opened the Palace Theatre in Harriman, Tennessee, on June 17, 1938, and closed it on December 13, 1938. Crescent operated two theatres in Harriman, one of them at a lower admission price than Smith was charging. Crescent had been operating for a number of years prior to 1934 and had no competition. Shortly after the first of the year 1939, the Princess Theatre which was operated by Crescent, was burned. Immediately thereafter Smith re-opened his theatre. Crescent rented a store which it converted into a theatre, having a seating capacity of 375, and began to rebuild the Princess. It rebuilt the [fol. 3099] Princess, with a seating capacity of 854, at a cost of over $88,000.00. Crescent continued to operate its second theatre. Smith operated his theatre until he sold his equipment on February 10, 1940, to Crescent. Smith's theatre and Crescent's second theatre had about the same seating capacity. Crescent's B house was superior to Smith's except that Smith had newer booth and sound equipment. There was no satisfactory evidence that Smith was unable to obtain product. As a part of the sales agree-

ment between Smith and Crescent, the former was to convert his old theatre into a store and continue to pay the rent to his landlord until the expiration of his lease which had a few years longer to run. He failed to do so, however, and it is being operated at the present time as a theatre in competition with Crescent by the owners of the building, who did not testify in the case and is presumably able to obtain a satisfactory product.

69. J. W. Baird had been operating a theatre in Newport since 1929. He had purchased this theatre from Parrott & Ausmus. Baird abandoned that theatre and built the Winston Theatre and opened it in 1935. It was a modern and up-to-date theatre. In 1937 Baird learned that Crescent had bought a lot in Newport for the purpose of constructing a theatre. He thereupon got in touch with Sudekum to see if they could get together. Sudekum referred him to Parrott & Hendren and they decided to form a corporation known as the Newport Amusements, Inc., which is not a defendant in this case. Baird sold a half interest in the corporation to the Cherokee Amusements, Inc., and he kept the other half, and rented to the corporation his theatre and equipment. Tim W. Smith leased a store building in Newport, the landlord converted it into a theatre, and Smith installed the equipment and opened his theatre on September 2, 1938. It had a seating capacity of 415. About the time Smith entered the town, Newport Amusements [fol. 3100] opened up a second theatre called the Park, with a seating capacity of 317. This theatre now operates part time. Smith had paid very little on his equipment when he closed in November, 1938, and the vendors repossessed same. He had paid very little on his rent and he left other obligations unpaid. The equipment for which he had paid was removed to his home in Knoxville, Tennessee, and stored in his attic. Smith was unsuccessful in his operation from the very beginning. While he testified generally as to his inability to obtain desirable pictures, his willingness to testify to whatever he thought Government counsel wanted him to say was very evident from his manner and demeanor on the witness stand, and on cross-examination he gave the impression of being unwilling to make answers which might be harmful to the Government's case. His testimony is of little value on any issue in the case.

70. In August 1937 Smith tried to license some Paramount features. Although Crescent was not playing and had not then licensed any of the Paramount 1936-37 features (some of which were then almost a year old) Paramount refused to license these pictures to Smith and permitted him to play only a few of its 1935-36 features which had previously been rejected by Crescent. (Ex. 91) In February 1938 Smith again asked Paramount to permit him to play some pictures in Morristown either first or second-run. (Ex. 92.) He was advised that Paramount could not make any pictures available to him because its "service had been sold to another exhibitor in Morristown for both first and second-runs." (Ex. 93.) At that time Paramount had already licensed its 1937-38 product to Crescent and given Crescent an option to play its 1936-37 product first-run under the Paramount franchise, (Ex. p. 24) which has already been referred to as far as the 1936-37 first-run product is concerned. Crescent chose to play only sixteen pictures, and it did not commence those sixteen until December 1937 and did not complete playing [fol. 3101] them until 1939. (Ex. P, 26). One reason Smith was advised that Paramount pictures were not available to him second-run was because of the repeat-run option in the same franchise. This is clearly indicated by the following portion of Morgan's letter to Unger of November 11, 1938, which was in response to a letter from Unger to Morgan, written after Smith had complained to the Department of Justice, directing Morgan to make some pictures available for Smith (Ex. 152):

> "Now as regards the last paragraph of your letter about second runs, following shows the population of each town:
>
> | | |
> |---|---|
> | Morristown | 5875 |
> | Harriman | 5000 |
> | Newport | 2753 |
>
> In any event, the only way we could sell second run, even if we wanted to in these particular towns, would be after Sudekum had taken the refusal, because Paragraph E of article 8, of the Crescent Amusement Company franchise, provides he can repeat any featu at a certain given price."

Although the 1937-38 product was thus tied up on both first and second run, Crescent played only four pictures second-run, and the first one of these was played after the close of the 1937-38 season. (Ex. p. 27)

71. On August 20, 1938, Smith signed applications for the following Warner product:

1. 40 of the 1937-38 releases and 52 of the 1938-39 releases for first run exhibition in Newport, Tennessee (Ex. W. 11).

2. 26 of the 1937-38 releases and 36 of the 1938-39 releases for second-run exhibition in Morristown (Ex. W. 9).

3. 36 of the 1937-38 releases and 26 of the 1938-39 releases for second-run exhibition in Harriman (Ex. W. 10).

On September 12, 1938 McCoy, Warner Atlanta exchange manager, wrote Smith that his contract application had [fol. 3102] been rejected, and that Rudolph, a Warner salesman, would contact him in the near future (Ex. 102).

On October 13, 1938, Warner licensed 26 of its 1938-39 releases to Newport Amusements for first run exhibition in Newport at a rental of $10.00 each (Ex. W. 12).

In Morristown, where the Smith application called for a commitment of 26 pictures from the 1937-38 product and 36 from the 1938-39 product, Crescent played only 8 of the 1938-39 releases on a second run showing under a spot booking arrangement, and played none of the 1937-38 releases (Ex. 341, 342.)

In Harriman, Tennessee, where Smith's application called for a commitment of 36 of the 1937-38 releases and 26 of the 1938-39 releases for second run exhibition, Crescent played none of the 1937-38 or 1938-39 features second run. (Ex. 341, 342.)

72. Smith was able to license Fox product for second run exhibition in Morristown, but Fox refused to sell him second run pictures in either Harriman or Newport.

73. Smith closed his theatres at Morristown and Newport. On February 8, 1940 he sold his equipment in the Palace Theatre in Harriman, Tennessee, to Crescent, and

at the same time dismissed an anti-trust suit that he had filed alleging a conspiracy to deprive him of films.

74. In March 1939 Max Buchanan leased a building in Athens, Alabama, from Bruce Nelson for use as a motion picture theatre. Rosenbaum attempted to interfere with Buchanan's negotiations with Nelson by calling on the latter and telling him that Muscle Shoals had licensed practically all of the good pictures, and Buchanan would probably be unable to pay the rent called for by his lease. He suggested to Nelson that he thought he might be able to persuade someone in Florence, Alabama, to lease Nelson's building.

Buchanan opened his theatre, the Bama, on May 8, 1939. At the time the Bama opened, Muscle Shoals was operating only one theatre in Athens, the Ritz; but shortly after the construction of the Bama commenced, Muscle Shoals started to construct a second theatre, the Plaza, [fol. 3103] which opened on June 6, 1939. The Ritz was extensively remodeled just before the Bama opened.

When Rosenbaum learned that a new theatre was about to be opened in Athens, the adult admission prices at the Ritz were reduced from 25 and 35 cents to 15 cents, and when the Plaza opened, it charged an adult admission price of 10 cents. Before the Bama opened, the Ritz seldom played double feature programs. In the first four and one-half months after Rosenbaum learned that the Bama was about to open, the Ritz played 26 double feature programs.

75. In October 1938 Muscle Shoals submitted an offer for the 1938-39 product of United Artists for the towns of Tuscumbia, Sheffield, Florence and Athens, with the understanding that all of the pictures included in the application were to be licensed to Muscle Shoals, or none of them. This deal was not accepted by the home office, and in November, 1938, Rosenbaum advised Prince, United Artists Atlanta exchange manager, that unless the deal was approved by a certain date, the offer would be automatically withdrawn. Muscle Shoals' application was not accepted until after the deadline set by Rosenbaum and he refused to reinstate his offer. Prince, the United Artists district manager, called Rosenbaum on several occasions after that in an attempt to secure a deal from him without success.

In March 1939 Buchanan called on Prince and advised

him that he was about to open a theatre in Athens. Prince told him that the 1938-39 United Artists product was open for Athens, Alabama, but he would not negotiate with Buchanan until the latter had secured a theatre. Shortly thereafter Buchanan saw Prince and Davis, the Atlanta exchange manager for United Artists, and showed them a lease which he had entered into for the Bama Theatre. Prince took an application from Buchanan. It was submitted with the following recommendation signed by Davis:

> [fol. 3104] "We are sending through in the usual manner deal covering the above town. This is a new operation in oppositon to Sudekum and Rosenbaum, who operate in Florence, Tuscumbia, Sheffield and Athens. As you no doubt will recall from previous correspondence, after we were finally successful in securing home office approval on the deal which was submitted for the Muscle Shoals Circuit the exhibitor refused to go through with the proposition, advising that in the future he was going to let Mr. Sudekum do his buying. Since that time we have contacted Mr. Rosenbaum several times in an endeavor to reinstate the deal without success. The proposition we are submitting for Athens alone is a good one, considering what Rosenbaum previously paid for the four towns and as there is no chance of reinstating his deal we recommend the approval of this one." (Ex. 189).

Harry Gold, vice president and eastern sales manager of United Artists, testified that Buchanan's deal was rejected because United Artists could secure more revenue by selling Muscle Shoals for its four towns of Tuscumbia, Sheffield, Florence and Athens, than by selling Buchanan for Athens, and if he accepted Buchanan's application for Athens, Muscle Shoals would not buy the United Artists product for its other three towns.

On April 3, 1939, Buchanan received a letter from United Artists advising him that his application for Athens had been rejected. On April 12, 1939, after the Buchanan application had been rejected, Prince submitted to his home office a deal with Muscle Shoals for its four towns (Def. Ex. 308,) and this deal was approved five days later (Ref. Ex. 209,) although it was 40 per cent less than Rosen-

baum's previous offer, which had been rejected by Lazarus with the following comment:

> "I am not going to enlarge on our dissatisfaction with this deal as it has been submitted because I am familiar with this operation and know your difficulties. Somewhere along the line, however, somebody has got to take a stand with Mr. Rosenbaum, and even if we are not going to be able to get into his situations this season, let's at least come out with some self-respect even though we do not come out with any film rental."

On November 8, 1938, Prince wrote to Lazarus as follows with reference to the first Rosenbaum offer, which Lazarus later rejected:

> [fol. 3105] "Although the deal that we are submitting is a flat rental deal, I still told Rosenbaum that we want a percentage and that I was not at all sure that I could secure approval on a flat rental deal. I did this because I know that Rosenbaum acquaints Sudekum with everything he does and so far we have told Sudekum that we must have percentage, however, I don't mind saying now as I have said recently, I don't believe we have a Chinaman's chance of getting one percentage picture on the Sudekum circuit. I firmly believe that this deal from Rosenbaum is the best deal that can be had by anyone and I believe the tops are more than is paid to any other Company, and while the $175.00 top represents no increase over the top that we received last year, I still feel that this deal should be approved unless for some reason I may not know, you may feel that we should still hold out with Sudekum for a percentage proposition, which in my opinion would mean staying out of the Sudekum Circuit." (Def. Ex. 202).

76. In March 1939, Buchanan was advised that there were no Loew's pictures available for Athens. On July 5, 1939, Buchanan wrote Loew's requesting an opportunity to negotiate for their 1939-40 product. He was advised in reply that Loew's had an established account in Athens to which it intended to give "the first refusal" of its 1939-40 product. (Ex. 190). Buchanan heard nothing more from Loew's with regard to the 1939-40 product although Loew's was

unable to make a deal with Muscle Shoals for that product until November 25, 1940, three months after the end of the 1939-40 season, and at that time Muscle Shoals licensed only 26 pictures.

77. On or about July 5, 1939, Buchanan wrote Warner asking for an opportunity to negotiate for its 1939-40 product. He was advised in reply that Warner had an old customer in Athens to which it expected to license its 1939-40 product (Ex. 191). Warner licensed its 1939-40 product to Muscle Shoals in March 1940, as part of the franchise which included the 1940-41, 1941-42 and 1942-43 product as well (Ex. W. 13). Under this franchise Muscle Shoals licensed only 30 pictures for each season (Ex. W. 13).

[fol. 3106] 78. On July 5, 1939, Buchanan wrote RKO inquiring whether their 1939-40 product was open in Athens. RKO replied that their product would not be open unless they were unable to negotiate with their established account (Ex. 192).

79. Around January 1, 1940, a mutual friend arranged for Buchanan to see Sudekum regarding the sale of his theatre to Muscle Shoals. Buchanan negotiated with Sudekum and Rosenbaum and their respective attorneys, Armistead and Mitchell, regarding the sale of his theatre, and finally agreed to sell the Bama Theatre to Muscle Shoals and dismiss an anti-trust suit which he had previously filed against it and Rosenbaum and Sudekum. As part of the same arrangement Buchanan agreed not to operate a theatre in Alabama or Tennessee for a period of five years, and to procure an agreement from his landlord that the Bama Theatre building would not be rented for theatrical purposes for a period of five years. There has been no theatre competition in Athens since that time. The Bama was not operated by Muscle Shoals, and after that theatre was closed, Muscle Shoals reduced the operation of its Plaza Theatre in Athens to two days a week.

80. Union City, Tennessee, is the county seat of Obion County, has substantial factory payrolls, and its three banks went through the depression without a failure. It is obviously a city which for years could have supported two theatres comfortably. G. W. Haynes opened a theatre there in about January 1934, in opposition to the theatre Crescent

was then operating, and in a short while Crescent put in a second theatre and cut admission prices. Haynes continued to operate in Union City until shortly after the organization of Strand in June 1935, when, Haynes closed his theatre at Union City, and his equipment was moved elsewhere. Crescent then closed its second theatre.

On March 21, 1934, shortly after Haynes had opened his theatre at Union City, T. W. Young, Fox Memphis exchange manager, wrote to Ballance, Fox southern sales manager, that that was the first season Sudekum had given Fox recog- [fol. 3107] nition in Union City and Dyersburg in three years, and that the deals Fox had in those two towns were very poor and that they could work out a much better deal. In spite of low prices received from Crescent, Fox, refused to deal with Haynes for fear of jeopardizing the Sudekum business.

Loew's aided Crescent to combat the Haynes competition by permitting Crescent to play its product second run in Union City until this competition was eliminated without requiring Crescent to commit itself to the exhibition of any specific number of its pictures.

81. In March 1939 John Dee Henry opened the Roxy Theatre in Union City after remodeling the building in which it was located at a cost of $8,000.00, and equipping it at an additional cost of $8,000.00. Young, the Fox Memphis exchange manager, described the Roxy as "one of the most beautiful little theatres I have ever seen in any town."

Crescent had been operating only one theatre in Union City—the Capitol—but commenced work on a second theatre—the Ritz—on the same day Henry commenced work on the Roxy and opened the Ritz a week ahead of the Roxy. The Roxy was a much better theatre than the Ritz.

On April 19, 1939, Crescent and Paramount agreed upon a rider to their franchise permitting Crescent to play Paramount pictures in Union City at either the Capitol, Ritz or Opera House, which was then being used as a temporary court house. The negotiation and execution of the rider at this time showed that Crescent intended if necessary to eliminate Henry, to operate all three theatres, and Paramount was willing to cooperate.

82. Henry was anxious to make a three-year deal with Universal and told Pritchard, Universal Memphis exchange

manager, that he wouldn't be interested in anything but a three year deal. At this time, October 1938, Henry had not fully decided upon going into Union City.

In approximately the middle of November, a contract application for 1938-39, with a rider for two additional years, was prepared and signed by Henry, and forwarded by [fol. 3108] Pritchard to the home office. In connection with this situation, I find the testimony of the Government witness directly controverted by the Witness for Universal Film Exchanges, Inc. The testimony of the Government witness is unsatisfactory and the testimony of the witness for Universal accords more plausibly with the documentary evidence.

I find that in this isolated instance, as a matter of fact, the Government has failed to establish that Universal Film Exchanges, Inc., withheld an approved contract from J. D. Henry Theatre in Union City as a result of any request, pressure, combination or other arrangement with defendant exhibitors herein; but that Universal Film Exchanges, Inc., merely received an application for a proposed contract from Henry during the latter part of 1938, pending the determination of the outcome of its existing negotiations with defendant exhibitors herein, and that such application by Henry for first-run in Union City was never approved by the executive officers of Universal Film Exchanges, Inc., and that such proposed contract was never sent to the Memphis Exchange approved by such executive officers, and was not withheld from Henry after approval.

Defendant Crescent Amusement Company had been for years previously the regular and established exhibitor customer of Universal Film Exchanges, Inc., in Union City, and in the ordinary and reasonable course of its business Universal preferred to make an agreement with such defendant Crescent for the exhibition of its pictures first-run in Union City.

The agreement between Universal Film Exchanges, Inc., and Crescent Amusement Company was finally concluded in the latter part of December, 1938, covering the season of 1938-39, which agreement was identical in its terms with the agreement made between Crescent and Universal covering the preceding seasons' product, towit, 1937-38. This agreement included within its terms the license of first-run exhibition by Crescent in Union City.

[fol. 3109] John D. Henry was engaged in the operation of the Ritz Theatre at Hickman Kentucky, for several years prior to September, 1938, when he sold his theatre at that point to Ruffin Amusement Inc.; he was also engaged in the loan and insurance business at Hickman for a number of years. After the sale of his theatre at Hickman, Kentucky, he began to make arrangements to open a competing theatre to the Crescent Amusement Company at Union City, Tennessee, and at or about the time of the sale of his theatre at Hickman he contacted H. I. Mansfield, salesman for Universal Film Exchanges, Inc., out of the Memphis exchange, as to the possibility of obtaining the Universal Products at Union City in the event he decided to open a theatre at Union City. He was told that he would have to see Mr. J. A. Prichard, branch manager at Memphis.

About October 15, 1938, Henry came to Memphis and called on Prichard with reference to the purchase of Universal pictures at Union City. He said that he had not fully made up his mind as to whether he was going to open in Union City, but wanted to know whether Universal product would be available to him if he did open, and stated that he was interested only in a three year contract. Prichard told him that the Universal Film Exchanges, Inc., had been selling its product regularly to Crescent Amusement Company at Union City for a number of years, and that negotiations were being carried on between Universal and Crescent for the sale of the 1938-39 product, but no contract had been made. He further stated that if they were unable to sell Crescent at Union City, Universal would be glad to discuss the sale of its product with Henry.

On November 15, 1938, Henry called on Prichard at his office in Memphis, and at that time stated to him that he definitely had made up his mind to open the theatre in Union City but had not yet been able to obtain a lease for a satisfactory location. He also stated that he had made application to Columbia and United Artists for their product. Prichard again told him that Crescent was their old customer in Union City, and that at that time negotiations [fol. 3110] were being continued between Crescent and Universal for the sale of the 1938-39 product, and that until these negotiations were concluded he would not be in a position to discuss product with Henry.

Henry insisted that Prichard allow him to make application for the 1938-39, 1939-40, and 1940-41 product, saying that the fact that he had made an application to Universal Film Exchanges, Inc., would be helpful to him in obtaining favorable action on his applications for United Artists and Columbia product. He stated, however, that in the event he made application and was finally unable to negotiate a satisfactory lease he wanted to be protected against the obligation of his contracting with Universal, in the event Universal received his applications.

Prichard agreed to allow him to make application and gave him the protection requested in the form of a verbal agreement that Henry might have a thirty day option on the contract in the event Universal made no deal with the Crescent Amusement Company, and accepted Henry's application prior to the expiration of the thirty day period.

Prichard gave Henry a copy of the application, and in accordance with the usual and customary practice, forwarded the other copies of the application to Harry McCarthy, Eastern District Sales Manager of Universal Film Exchanges, Inc., in New York, who was his immediate superior in the matter of passing upon Universal applications. When the application was forwarded to McCarthy, Prichard explained to him generally the circumstances surrounding its execution by Henry.

Negotiations between Universal and Crescent Amusement Company for the sale of its 1938-39 product for the various Crescent towns, including Union City, commenced in July 1938, and continued sporadically but more or less continuously from that time until an agreement was finally concluded on December 22nd or 23rd, 1938. Such negotiations were in progress on November 15, 1938, when Henry made his application for first-run.

Several days prior to December 1, 1938, Henry again [fol. 3111] contacted Prichard, advising him that he was having difficulty in obtaining his lease, but that he expected to get the matter settled satisfactorily within the next few days, after which he would advise Prichard as to the outcome of his negotiations for his lease. In this conversation the 1938-39 product was again discussed, and at that time Prichard told him that there was no change in Universal's original position with reference to the sale of its product.

On December 1, 1938, following the conversation previously had with Prichard, Henry wrote Prichard advising him that he would not be able to be in Memphis that week, and that he would be out of town the first of the following week, and would be in Memphis to see Prichard on December 10th. He also stated that he had not heard from either United Artists or Columbia. On December 7th, Henry wired Prichard asking him to do nothing about Union City until he saw him on December 10th. Henry was not in Prichard's office between December 1st, and December 10th, both inclusive.

On December 10th Henry called on Prichard at his office in Memphis, and at this time Prichard again told him that Universal hadn't determined whether they would deal with Crescent Amusement Company for their 1938-39 product at Union City, and that he had been notified to be in Nashville on December 13th, to meet with other Universal officials to resume negotiations with the Crescent Amusement Company, and that after his return from Nashville he would advise Henry as to the outcome of these negotiations, and whether or not Universal would be in a position to consider his application for Union City.

On December 14th, Henry again wrote Prichard, stating that it was necessary for him to give his landlord an answer as to his lease, and urged him to let him know what Universal intended to do with reference to the sale of its product to him. In this letter he also asked Prichard to extend the thirty day option until January 10th.

The negotiations between Universal and Crescent Amusement Company, in which Prichard participated, extended over December 13th and December 14th, Prichard leaving [fol. 3112] Nashville in the afternoon of December 14th for Memphis. At this time it appeared that the negotiations would be concluded, but no definite agreement had been reached.

On December 15th, upon receipt of Henry's letter of December 14th, Prichard wired him that he would be unable to give him any information until Monday (which would be December 19th).

The negotiations between Universal and Crescent at Nashville resulted in a tentative agreement as to the 1938-39 product, which had to be approved by the New

York Office, and which Harry D. Graham, District Manager of Universal at Atlanta, took to New York with him on December 15th or 16th.

The negotiations between Universal and Crescent Amusement Company revolved around an agreement as to the price to be paid by Crescent for first-run Nashville, and it was only on December 14th that a proposition with reference to first-run Nashville was made by Crescent Amusement Company, which promised any hope of acceptance in New York. The proposition was submitted to Mr. McCarthy by Mr. Graham in New York and was finally accepted by McCarthy for Universal about December 22, or 23rd.

Sometime between December 25th and December 28th, Prichard was notified that a deal had been made between Universal and Crescent Amusement Company, which included the sale of its product at Union City, and that the Henry applications were rejected.

This was the first notice that Prichard had as to the outcome of the December 13th-14th negotiations with Crescent Amusement Company, and following Prichard's telegram of December 15th, to Henry, above referred to, on December 19th he again wired Henry, advising him that he would get in touch with him Thursday with reference to Union City. On December 23rd, Henry again wired Prichard, requesting him to have Universal accept or reject the application that day, and to wire him immediately.

[fol. 3113] As soon as Prichard received information as to the outcome of the Crescent negotiations and the action of the New York office on the Henry application he advised Mr. Henry.

Prichard notified Henry, and on December 30th, Henry came into Prichard's office at Memphis and made an application for twenty-two pictures second-run, 1937-38 product, at Union City, which application was accepted. Henry did not close his lease until after January 1, 1939, and his contracts with United Artists and Columbia were not accepted until ten days or two weeks after that. Henry played only four of these pictures and did not pay for the balance.

From the time Henry's application was forwarded by the Universal Exchange at Memphis to the Universal Executive Office in New York until it was returned to the Memphis Exchange with notice of rejection during the latter part of

December 1938, it was never returned to the Memphis Exchange, nor was it at any time accepted nor approved by the New York Office of Universal Film Exchanges, Inc.

Neither Prichard nor his secretary at any time told Henry that the application was in the Memphis Office, or that it was approved, nor did Prichard tell Henry that the application had been approved, but he had been requested by his district manager, Mr. Graham, to withhold delivery pending further negotiations with the Crescent Amusement Company.

83. Crescent made a deal for the RKO product for the 1938-39 season, which was approved December 20, 1938. The contract contains a provision giving the exhibitor the right to select 21 pictures, the exhibitor's rate of rejection to be limited to two pictures out of each three released, and the rejection of a picture must be given to the distributor within 21 days after availability.

Henry negotiated with Avery, RKO Memphis exchange manager, from October 1938 to February 1939, concerning a deal for the RKO product. Avery said RKO had a [fol. 3114] number of pictures from prior years that had not been exhibited in Union City and offered these pictures to Henry. Henry also tried to license 1938-39 product. Avery told Henry that he had sold 15 pictures, but that he couldn't sell any of the other pictures to him because he had been advised by Mr. Sudekum's office not to sell those pictures to Henry as Crescent was going to open a theatre in Union City, and would likely want all of them.

A letter from Avery to Jules Levy, RKO sales manager, dated January 28, 1939, states in part:

> "Mr. J. D. Henry, who is building a new theatre called the Roxy in Union City, Tennessee, in opposition to the Sudekum Circuit, called on me yesterday for the purpose of purchasing such film as is unsold to Mr. Sudekum.
>
> I made a deal with him only for the unsold portion of our 1937-38 product, this consists of eighteen features, and inasmuch as it was only the program pictures that were left, he would only pay a program price, which is $10.00.

, I would not sell him any of the 1938-39 product as Mr. Sudekum's booker advised that they were putting in a second theatre themselves over there, and would no doubt use our entire 1938-39 product.'" (Ex. 179,)

The only contract Sudekum ever made for the 1938-39 product was the 21-picture, selective first-run commitment (Ex. 21).

84. When Henry went to Union City, he knew that Crescent was running Paramount pictures, and he called on W. F. Bugie, Paramount Memphis branch manager, for the purpose of licensing some second-run pictures. He was informed that Sudekum's franchise gave him an option on second-run pictures and that he (Bugie) would have to take the matter up with his company. Henry went back later and was told that the second-run product was under contract to Sudekum or Crescent. At the same time, he was offered six pictures eliminated by Crescent which he bought.

On January 27, 1939, Bugie wrote a letter to H. F. Wilkes of the district office, with respect to Henry, as follows:

[fol. 3115] "* * * He has also, agreed to buy a selective deal on the S-10 product second run—30 pictures, rentals from $13.00 to $15.00 with 6 of the pictures to carry a percentage sharing agreement.

The Sudekum franchise provides for an option on second run in any of his towns.

Will you kindly advise me whether I should consider a second-run in any of his towns." (Ex. 159).

Bugie was a witness on behalf of the defendants and testified that he told Henry he would not sell him any second run pictures because he didn't think the town could support a second-run theatre. He said this conversation was before he wrote the letter of January 27, 1939, to Wilkes, quoted above, and at that time he didn't have the franchise before him and didn't know anything about it, but he had read the franchise. This letter does not even refer to whether or not the town justified or would support a second-run theatre.

85. Henry called on T. W. Young, Fox Memphis branch manager, and was able to buy pictures which had been eliminated by Crescent. He also tried to make a contract for second-run pictures.

Young wrote Ballance, Fox southern district manager, on January 28, 1939, with respect to the deal for rejected features as follows:

> The attached proposition submitted for the Roxy theatre, Union City, Tennessee, probably does not require more explanation than given on the recommendation, but for your information, the gentleman opening this theatre about March 22nd, 1939, is the one that I spoke to you about several weeks ago, wanting a second-run deal in this town. At the time, you stated we would have to renew our franchise with the Crescent Amusement Company this year and that you would rather not have this obstacle to overcome.
>
> I stalled the Exhibitor until recently and he was so persistent that it was my suggestion that he use the pictures first run previously passed up and eliminated by Mr. Sudekum. That is what this contract represents. I ascertained that Metro, Paramount, and others have tendered him pictures eliminated by his opposition. [fol. 3116] If you have no objection, I see no reason why we should not pick up this additional revenue." (Ex. 213).

On April 11, 1939, Young wrote Kupper, Fox eastern sales manager, as follows:

> "First, the Roxy Theatre, Union City, Tennessee—Mr. J. Dee Henry erected and opened one of the most beautiful little theatres I have ever seen in any town. This is in direct opposition to a house operated by the Crescent Amusement Company. I negotiated a deal for all pictures passed up by the Crescent Amusement Company to be used as first-run in the Roxy Theatre and Mr. Henry has now demanded a second-run on 36 pictures from our L-6 releases and 16 to 20 of the K-5 group.
>
> I think the town large enough for a second-run, furthermore, I believe that on some of our bigger subjects sold on a guarantee against percentage we could earn more second-run than we did on a flat rental basis, first-run with Tony Sudekum. Realizing that our franchise terminates with Sudekum this year, I have been reluctant and stalled Mr. Henry regarding a second-run up to the present time, because I did not know just

what effect it would have on our negotiations with Sudekum for next season. On the other hand, I know this gentleman Henry is not going to sit idly by and close his theatre for the want of product. I discussed the situation with Mr. Wilson of Atlanta at the Convention and it was his opinion that a sale of our product to Mr. Henry second-run in Union City would have no effect on his negotiations with Sudekum on the circuit.

The time is pretty close when I must take a definite stand, one way or the other—either take the second-run deal, or tell the exhibitor definitely we cannot sell him. I would, therefore, appreciate your consideration of this situation and advice." (Ex. 216,).

Kupper testified, but was not questioned about the answer, if any, that he gave to Young.

86. Early in May 1939, Ruffin saw Henry and told him that he had made a mistake in opening the Roxy because he could not buck Sudekum, and suggested that he see Sudekum about selling the theatre to Crescent. Henry did see Sudekum in Nashville in June 1939 and sold the Roxy Theatre to Crescent for $8,000.00, the value of the equipment.

Crescent required Henry to agree not to compete with [fol. 3117] Crescent or its affiliates in any of their towns for a period of 25 years. The Roxy was closed immediately after Crescent bought it and has since been converted into a store.

87. W. F. Roth has operated the Palace Theater in Gallatin, Tennessee, since 1913; in 1929 or 1930, R. T. Hill of the Cumberland Amusement Company, asked Roth to set a price on his theatre. Roth said he was not interested in selling, and Hill told him that Crescent was going to enter Gallatin and that the town was not large enough for two theatres. In November 1937 Crescent opened the Roxy Theatre in Gallatin in opposition to Roth's Palace, and both theatres have been operated since that time.

88. Roth played Paramount pictures every season from 1914, to and including the 1937-38 season. In February 1937 Morgan wrote to Joseph Unger, Paramount's southern division sales manager, that Roth had been a good account, and Morgan testified that in the summer of 1937 he regarded Roth as a good account. In the summer of 1937

Roth asked the Paramount salesman, Lonnie Loew, if it would be possible to get a franchise, and Lowe replied that Paramount did not sell franchises to anybody.

In January 1938, Roth became worried about whether he would get the Paramount product for the 1938-39 season, and went to Atlanta to see Cecil House, the Paramount exchange manager. House told him that he had bad news, that Gallatin had been included in the Crescent Franchise, commencing with the 1938-39 season. House said by way of explanation that this had been done in New York and that he had nothing to do with it.

Roth returned to Gallatin and on January 22, 1938 wrote the following letter to Unger (Ex. 36).

> "I made a special trip to Atlanta this week, to see about contracts for your pictures for 1938-39 and was very much disappointed by the information furnished by your branch manager.
>
> [fol. 3118] "I understand you have sold a franchise to my opposition for a period of five years and completely refused to offer your product to me, after being a consistent user of your product for over eighteen years and paid you plenty percentage during that time. Your representative, Mr. Lowe advised me about this time last year that I needn't worry about Paramount, as they would stick by me. I also tried to buy a franchise deal from him at the time and he told me that you wouldn't sell anybody a franchise.
>
> I think after using your product for over 18 years without a bobble of any kind, that I am due some sort of explanation, why I deserve such treatment as above."

After returning from Atlanta, Roth also wrote to the Department of Justice complaining about Paramount's sell-away of its 1938-39 product to Crescent.

On February 10, 1938 Unger wrote Morgan the following letter to which was attached Roth's letter of January 22, 1938, to Unger (Ex. 153):

> "Dear Mr. Morgan: The attached copy of letter speaks for itself. Was it absolutely necessary for us to include Gallatin in the Sudekum franchise?
>
> Please write me in connection with the attached so I may reply intelligently to this exhibitor."

Morgan replied to Unger on February 11, 1938, as follows (Ex. 149):

> "Replying to your letter of February 10th, in regard to Gallatin, Tennessee, it will be absolutely necessary to include Gallatin in the franchise. If you recall, Sudekum made an issue out of this in New York because even after we had started negotiating with him on the franchise Gallatin had been sold in July and we agreed to include Gallatin for the remaining four years in the total of his product for the Crescent circuit. Incidentally, Tony has built a big, new, beautiful theatre in Gallatin. Roth's old house is a pretty poor one and it is very doubtful if he will be able to continue against Tony's big proposition.
>
> For instance, he had a guarantee of $30.00 on Artists and Models, and High, Wide and Handsome, and he grossed $35.50 on Artists and $45.15 on High and Wide. He had $30.00 guarantee on Double or Nothing, and grossed $60.40."

On March 8, 1938, House called upon Roth and told him that although the 1938-39 product had been sold to Sudekum, Paramount would attempt to secure a split deal for Roth if he were agreeable to that. Roth said that he would [fol. 3119] consider the split deal and let House know. On March 17, 1938, Roth received a letter from Unger asking him to make up his mind regarding the split deal within 30 days, and on May 13, 1938, Roth wrote Paramount at Atlanta rejecting the split deal offer.

Roth's 1937-38 Paramount deal (Ex. P. 7) was a much better one for the distributor than the deal Paramount took from Crescent the following season (1938-39) (Ex. P. 24). Roth's 1937-38 deal called for 16 pictures in the top bracket at 40% against a guarantee; there were only 4 pictures at 40% in the top bracket of Crescent's 1938-39 deal, with no minimum guarantee. The next bracket in the Roth deal called for 12 pictures at $30.00 each as compared with the second bracket in the Crescent deal, which called for 8 pictures at $25.00 each. In the third bracket of the Roth deal there were 16 pictures at $25.00 each, while there were only 10 pictures at $20.00 each in the third bracket of the Crescent deal. The remaining pictures in the Roth deal

were licensed at $15.00, while the remaining pictures in the Crescent deal were licensed at $10.00. Roth paid more for Paramount pictures in Gallatin in every one of the four preceding seasons that Crescent did in 1938-39. (Ex. 332).

89. Roth used Loew's pictures from 1916 up to and including the 1936-37 season. The Loew's salesman, McGuire, failed to call upon Roth in the summer of 1937 as he customarily did, and on September 30, 1937, Roth wrote the following letter to Loew's (Ex. 29):

> "Please advise by return mail whether or not you intend to sell your pictures for next season for use in my theatre. Thanking you in advance for a prompt reply, I remain."

Roth never received a reply to this letter.

On December 6, and 7, 1937 the Roxy Theatre, (Crescent) played "Conquest", a Loew's 1937-38 feature, and on December 22 and 23, 1937, the Roxy played a second Loew's 1937-38 feature. It played two or more of the Loew's 1937-38 features in January 1938, and seven more in February, 1938.

[fol. 3120] On December 27, 1937, Roth wrote Loew's calling attention to the fact that after having played Loew's pictures for 15 years the 1937-38 product was sold away from him without even being offered to him, (Ex. 30), and sent copies of this letter to the trade papers.

On or about January 15, 1938, Avey, Loew's Atlanta exchange manager, called on Roth and asked him if he could use some pictures. Roth replied that he could use 15 or 20 pictures, but asked how he could use Loew's pictures when they were already being played at the Roxy theatre. Avey replied that he thought Roth would be interested in some second-runs, and when Roth said that he did not play second-run, Avey left.

Roth received a letter from Avey dated January 18, 1938, which read in part as follows (Ex. 32):

> "I wish to thank you for the courtesies extended me during my visit with you Saturday, January 15th.
>
> I was disappointed when you told me that you could not use our 1937-38 product, that you had open time for only fifteen (15) pictures."

On January 25, 1938, Roth wrote Avey as follows (Ex. 33):

> "I am unable to understand the gesture of your letter dated January 18th and received this morning. I wrote you several times in September, asking you to advise me by return mail, whether or not you intended to sell me your product for the season of 1937-38 and haven't received a reply to date. I wasn't given a chance for refusal of the new product. Your new product was sold and is being shown at the Roxy Theatre in Gallatin and am unable to figure out how you expect them to be shown at both houses, as I do not run second-run pictures.
>
> Please explain yourself further on this matter, as it is all a mystery to me, as I can use more pictures than you will release."

Roth testified that on his visit of January 15, 1938, Avey offered him only second run product. Avey testified that on his visit of January 15, 1938 he had offered Roth some first run pictures but he did not recall whether he had [fol. 3121] offered Roth all of the 1937-38 Loew's releases which had not already been played by Crescent.

On February 9, 1938, Avey and McGuire again called on Roth and offered him a split deal of Loew's 1937-38 product. During the course of this visit, Avey mentioned the fact that he knew Roth had complained to the Department of Justice. On February 21, 1938, Avey wrote Roth offering him a split deal (Ex. L. 2). Roth rejected the split deal by a letter of February 28, 1938, (Ex. 34). Crescent had already played 11 pictures, or almost 25% of Loew's 1937-38 product (Ex. 331).

Prior to November 10, 1937, the attention of T. J. Connors, Loew's assistant general sales manager, was called to the fact that their proposed deal with Crescent for the 1937-38 season included Gallatin.

On December 21, 1937, Postman, contract clerk in Loew's New York office, wrote the following letter to Kessnich (Ex. 174):

> "We received Sudekum contracts yesterday and approved all of them with the exception of the Roxy Theatre at Gallatin, Tennessee. According to our records,

we have sold the New Palace Theatre in this situation for many years and neither Mr. Connors nor the writer recalls your having mentioned it when we discussed the Sudekum deal generally. The terms of the Roxy Theatre are not as good as the terms we had last season for the New Palace Theatre both on features and shorts, but Mr. Connors requests that we withhold action on the contract pending receipt of further advice from you as to reasons for not continuing with our old customer in this situation."

On December 22, 1937, Kessnich replied to Postman as follows (Def. Ex. 59):

"In reference to the Roxy Theatre, Gallatin, Tennessee—Sudekum account, Mr. Roth operating the old theatre in Gallatin has never been a satisfactory account. Aside from that he only has a little store show, with plate glass windows in the front of it, and for a period of years we have never had anything but trouble in handling the account.

"Sudekum has built a much better theatre in the situation and in allocating the prices for Gallatin, we used the rentals set up previously for another town of comparable size in the circuit. You will have to approve the Roxy Theatre, Gallatin contract as it is a part of the whole Sudekum deal and I would thank you to do [fol. 3122] so immediately."

Connors testified that he overruled Kessnich's recommendation that the product be sold to Crescent and directed Kessnich to offer the product to Roth, but he did not stop Crescent's Roxy Theatre from continuing to play the features Kessnich was supposed to offer Roth. Connors did not give his final approval to the Crescent contract until March 3, 1938, but between December 21, 1937, the date on which Postman wrote Kessnich that Connors had requested action on the Crescent application be withheld, and March 3, 1938, the Roxy Theatre played 9 of the Loew's 1937-38 releases, and the effect on Roth's business in Gallatin was exactly the same as if the Crescent Theatre had played those pictures under a contract approved in December 1937.

Avey attempted to explain the failure to withhold these 9 pictures from Crescent by stating that at the time the

Crescent application was taken Crescent had booked a few pictures, and Loew's did not want to inconvenience Crescent by pulling the dates on short notice. Permitting a new account to play a substantial number of pictures before the contract was approved was an extraordinary procedure. In only three instances has the Loew's Atlanta office allowed new accounts to play pictures before their contracts were approved, and in each case only one picture was played in that manner (Ex. 372).

None of the Loew's 1939-40 releases were shown at the Roxy Theatre until January 30, 1941. On June 10, 1940, Roth wrote Loew's asking for an opportunity to license some of that season's pictures (Ex. 40). On June 25, 1940, Avey replied that they could not negotiate with Roth for this product as they were engaged in negotiations with their established account in Gallatin for the sale and exhibition of the product at the Roxy Theatre (Ex. 41). Crescent did not enter into a contract with Loew's for the exhibition of the 1939-40 product in Gallatin until January 17, 1941 (Ex. L. 7), and then licensed only 20 pictures out of the entire 1939-40 product (Ex. L. 7).

[fol. 3123] 90. W. O. Taylor has been operating the Uptown Theatre in Dresden, Tennessee, since September 1936; Dresden is approximately eleven miles from Greenfield, Tennessee, and nine miles from Martin, Tennessee. In 1940, the population of Dresden, Tennessee, was 1,115; that of Greenfield was 1,509; and Martin had a 1940 population of 3,587.

91. Taylor's 1937-38 Paramount contract provided: "No town is to have clearance over this town" (Ex. P. 3). In the spring of 1938 Tom Watson, a Paramount salesman, called upon Taylor at his office and said that he had to do something that he disliked very much. He then told Taylor that his home office had made a five-year franchise with the circuit, that Martin and Greenfield had been granted clearance over Dresden, and they would have to cancel the dates on all of the pictures he had booked, and rebook them behind Martin and Greenfield.

The following week Taylor went to Memphis and spoke to Mr. Bugie, the Paramount branch manager, who said that the home office had sold Crescent a franchise, that he did not have any control over it, and that he had cancelled

the dates on the pictures which had been booked ahead of Martin and Greenfield.

On or about October 10, 1938, Watson negotiated with Taylor for the 1938-39 Paramount product. Although Taylor told him that he wanted to play clear of Martin and Greenfield, Watson said that he could not accept an application except with the provision that Dresden play behind Martin and Greenfield. Accordingly, Taylor's contract for the 1938-39 season provided Martin and Greenfield to have prior runs if played within 60 days of national release and provided prints were available (P. 4). His Paramount contracts for the 1939-40 and 1940-41 seasons contain similar provisions (Ex P. 5, P. 6).

The change in the Dresden run cannot be accounted for on the basis of the film rentals the three towns paid, because in the 1937-38 season when Taylor's contract provided that he was to play clear of Martin and Greenfield, [fol. 3124] he paid Paramount much more than it received from those two towns, and in the 1938-39 season when Martin and Greenfield played ahead of him, Taylor still gave Paramount a better deal than each of those towns, and in 1939-40 Taylor gave Paramount a better deal than Greenfield and almost as good a deal as Martin.

At the time the Dresden run on Paramount pictures was changed, Ruffin and Stengel were interested in acquiring the town (Exs. 242-43). They have not yet acquired it.

92. Page has been operating the only theatre in Mount Pleasant, Tennessee, since 1933. On several occasions late in 1936 and early in 1937, Castleberry and Stengel called on Page and told him they were interested in purchasing his theatre, and each time Page told them he was not interested in selling. On April 9, 1937, Stengel wrote Page:

> "I have not heard from you regarding my letter of April 1st. I understood from our conversation that you wished to talk to Mr. Sudekum before we went any further with our plans. I want to be fair with you about this matter in that we are holding up other negotiations until we hear from you." (Ex. 24).

A few days after writing this letter, Stengel again came to see Page. He insisted that Page set a price on the house; and when Page quoted a figure of $25,000.00 Stengel said:

"For $25,000.00 I can build a theatre across the street and lose money for three years and still save money on it."

About this time it was rumored in Mount Pleasant that Crescent was about to build a theatre, and as a matter of fact, Crescent took an option on a lot. Crescent could not have acquired this lot for the purpose of building a theatre on it as the lot was not deep enough for a theatre, its price was too high, and its location was poor.

93. Prior to the 1937-38 season, Page had played Paramount pictures without regard to when they played in Columbia, a Crescent town eleven miles away. In negotia- [fol. 3125] ting the Crescent franchise, however, Paramount agreed to give the Crescent theatre in Columbia thirty days' clearance over Mount Pleasant (Ex. P. 24), and since then Page has been able to license Paramount pictures only in accordance with that clearance.

94. E. R. Perdue, president of the East Gadsden Bank, was invited by 10 employees of the Goodyear plant in East Gadsden, Alabama, to join with them in putting up the Dixie Theatre in East Gadsden. The investment in the Dixie Theatre was $21,600.00. It was opened September 2, 1939, after the institution of this suit. At this time, there were four theatres operated by Crescent in Gadsden, the Capitol, Princess, and Gadsden in downtown Gadsden, and the Ritz, in the Alabama City section of Gadsden, about two and one-half to three miles west of downtown Gadsden. The Dixie is about a mile and a half from downtown Gadsden and four or five miles from the Alabama City section. The latter has been a part of Gadsden for nearly ten years. There is a direct bus connection between the Dixie and the Ritz, and it is a 20 to 30 minute trip by automobile. East Gadsden is made up mostly of Goodyear employees and about 50 per cent of them have cars.

East Gadsden is a mill section of Gadsden and the theatre was erected as a neighborhood enterprise for the reason, as given by the president of the owning corporation, that residents of East Gadsden needed a neighborhood theatre so that they would not be required to pay the high admission prices charged by the down-town A theatre in Gadsden proper and would not be required to make the nine or ten mile round trip journey to Crescent's Ritz Theatre in the

Alabama City section of Gadsden, which is another mill section on the opposite side of Gadsden proper. On the basis of this evidence, East Gadsden and Alabama City cannot fairly be regarded as competitive. Alabama City was formerly a separate corporation, but a few years ago was taken into the City of Gadsden. According to the 1940 census Gadsden has a population of 36,975, as compared with a population of 24,042 in 1930, when Alabama City was a sepa- [fol. 3126] rate corporation. The distributors continued to treat Alabama City as a separate corporation and to make first-run deals for Alabama City although, when considered as a part of the City of Gadsden, the Alabama City theatre actually exhibits its pictures after they are exhibited by the down-town A theatre. All of the theatres in Gadsden proper, including the A theatre known as the Princess and two B theatres, the Gadsden and the Capitol, are operated by Crescent, as well as the Alabama City Theatre, known as the Ritz, and this was the situation when the Dixie Theatre in East Gadsden was erected.

The Ritz Theatre at Alabama City is about the size of the Dixie and is in an old building. It charged 5 and 15 cents in the afternoons and 10 and 20 cents at Night. Wednesday was bargain day at 10 cents. The Dixie charged 5 and 10 cents in the afternoon and 10 and 20 cents in the evenings.

The Princess is the largest theatre in Gadsden and has 1200 to 1500 seats. The Gadsden is an opera house about 30 years old and seats 817. It used a combination vaudeville and picture program. The Capitol is a very small and old theatre; the Dixie is more modern in every respect than any of the other theatres except the Princess.

95. The 1939-40 Loew's product was not shown in the Crescent theatres during that season. The Dixie manager, Curry, tried to make a deal for this product in July, 1940, at the end of the season, but Avey, Loew's Atlanta branch manager, and Butler Loew's salesman, told him they were negotiating a five-year deal with Crescent, and therefore, could not discuss a deal with him. The only pictures available were six re-issues, four of which he bought. Curry asked to spotbook the current season's (1939-40) product under a special waiver clause which could provide that the Dixie would relinquish its first-run if Crescent decided to buy. He received a reply on July 26, 1940, from Avey

saying that they could do nothing as they were still negotiating.

[fol. 3127] H. T. Bailey succeeded Curry as manager of the Dixie on September 19, 1940; Bailey immediately made a written application for the 1939-40 product under date of September 20, 1940, nearly a month after the end of the season. He offered to buy this product upon the condition that if the Princess started using it, the Dixie would automatically drop back to second-run, (Ex. 87). He followed this letter up with a second letter October 2, 1940 (Ex. 88), but received no reply to either letter.

In November 1939, Butler called on Bailey and offered him the 1940-41 product second-run. Bailey asked him about the 1939-40 product, and he said that he had not yet worked out a deal with Crescent. At this time, Crescent had begun to play the 1940-41 product.

Bailey made a contract for 1940-41 pictures with the following clause: "Subsequent, follow, Ritz Theatre, Alabama City, not earlier than 60 days after first-run in Gadsden" (Ex. L. 10).

Under this contract, pictures were made available approximately 60 days after the Princess, but the Ritz at Alabama City was allowed to play them 14 to 21 days after the Princess. Bailey asked Butler why the Dixie had to follow the Ritz and Butler said that was the policy that had been set up and if the Dixie wanted pictures, it would have to get them after the Ritz.

On March 26, 1941, Bailey was finally able to make a contract for the 1939-40 product (Ex. L. 11). At this time, the Princess had commenced to exhibit that product. This contract contained the same provisions as to run as the contract for the 1940-41 product, and Bailey again raised the same question about playing behind the Ritz and got the same answer.

The Ritz made no contract for the 1939-40 product. The contract for the 1940-41 season shows no clearance in favor of the Ritz over the Dixie. Avey and Connors were not examined by the defendants about the reasons for compelling the Dixie to follow the Ritz. Butler did not testify.

96. Curry bought a subsequent run of the 1939-40 Fox
[fol. 3128] product on August 1, 1940; there was no clearance specified because this product had already been played in Gadsden. Mitchell, Fox salesman, told him that if these

pictures were played off rapidly, he would give him "a nice set up" on the current (1940-41) product.

On November 12, 1940, Bailey made a contract with Fox for 1940-41 product. This contract contained the following provision: "Subsequent, not less than three per month as available, 90 days after first-run Gadsden." Bailey argued that the comparative merits of the theatres entitled the Dixie to at least a play on a par with the Ritz, but Mitchell told him that if he wanted the pictures, he would have to play them third run in the city of Gadsden. The Fox pictures played in the Ritz about a month after they played first-run at the Princess, and two months later were available to the Dixie.

Wilson, Fox Atlanta exchange manager, was called by the defendants to explain why this situation, and he testified that it was not unusual for theatres to play film more than 90 days after release. He made no statement as to why the Dixie had to follow the Ritz.

97. Bailey made a contract with Warners for the 1940-41 feature product in December 1940. This contract contained the following provision: "sub-run—pictures are to be made available 14 days after second-run." J. H. Black, the salesman, explained to Bailey that "second run" as used in that contract, meant a "second down-town run" at the Gadsden or Capitol. The way this worked out was that a Warner picture played first run in the Princess, then in about two or three weeks it played at the Ritz, then it was run at either the Capitol or Gadsden, and 14 days thereafter, it became available to the Dixie for an actual fourth run in Gadsden.

The explanation made to Bailey by Black, as to why the Dixie had to follow the Ritz was that the Ritz "was set up on their books as a first-run account and there was nothing he could do about it," although Bailey offered to pay rentals on a par with the Ritz if he could license pictures on an [fol. 3129] equal basis. Bailey testified "some pictures of Warner Brothers might have been run as many as four times in Sudekum theatres" before he got them. This resulted from the fact that under the Warner franchise Crescent had bought a first run and a selective second run for the Princess, Capitol and Gadsden, (Ex. W. 7) and a first run for the Ritz, with a repeat-run option (Ex. W. 6). The repeat-run option provided that this run was subject "to all runs and clearances which may now exist or may here-

after be granted to other exhibitors in Alabama City." As there were no other exhibitors in Alabama City, Crescent was free to repeat pictures at the Ritz just as soon as a print was available. After the first run at the Princess, Crescent thus had the privilege of playing two more runs at the Ritz and an additional run at the Capitol or Gadsden before the Dixie could show the picture. The Ritz contract contains no provision for clearance over the Dixie (Ex. W. 6).

98. Bailey negotiated contracts with United Artists in December 1940, for its 1940-41 product (ex. UA 3, R. 1297.) These contracts contained a provision "run subsequent", "to be played as available". Barnes, a United Artists salesman, told Bailey that this meant that Dixie would get the pictures 90 days after the Princess and that the term "subsequent run" was used so that the Ritz Theatre in Alabama City could get the pictures before the Dixie got them. United Artists pictures were made available to the Dixie about one and one-half months after they played the Ritz. Barnes said he didn't know why the Dixie had to follow the Ritz but if he wanted the pictures, that is the way he would have to play them.

99. For many years prior to 1939 and up to the present time United Artists Corporation has sold its product to the Crescent Amusement Company for the Ritz Theatre at Alabama City and the three Crescent theatres in Gadsden proper. During the time Alabama City was a separate corporation the Ritz Theatre was set up as a first-run situation in Alabama City, and after Alabama City became a part [fol. 3130] of Gadsden, Alabama, and prior to the opening of the Dixie Theatre in East Gadsden, United Artists Corporation had continued the established custom of setting up the Ritz Theatre at Alabama City as a first-run situation for the Alabama City area, booking its pictures first-run Alabama City, but subsequent to the first run in Gadsden proper of the Crescent A House. After the establishment of the Dixie Theatre in East Gadsden and up to the present time it has continued this established custom.

100. Curry didn't attempt to negotiate with Paramount "because it was well understood that the Crescent Amusement Company had a first-run franchise and second-run option." The franchise provides both a first run in Gadsden

and a first run in Alabama City with a repeat-run option.

Bailey negotiated with Fogler, the booker at the Paramount Atlanta exchange, who told him Mr. Sudekum then had a "first-run franchise and second-run contract in downtown Gadsden and first-run contract in Alabama City," so that when the Dixie got pictures it would actually be a fourth run. He therefore, did not buy a full season's product, but merely arranged to spotbook ten pictures. The Paramount franchise grants a first run in Gadsden and a first run in Alabama City, with the option of repeating pictures in either place.

Fox, Loew, Paramount, United Artists and Warner all held the Dixie back of the Ritz, although there was no clearance provision in their contracts with the Ritz which would require them to do so. Their uniformity in holding a superior theatre behind an inferior one may only be explained by the pressure which Sudekum was able to exert on each of these distributors.

Other than the situation resulting from the execution of the franchises in question, the Court views evidence relative to the Gadsden area as significant only in comparison of the preference accorded the Ritz Theatre in Alabama City.

101. J. W. Baird, President of Newport Amusement [fol. 3131] Company, an affiliate of Crescent, threatened Taylor and Dr. Hicks with the construction of a competing theatre in Copperhill, Tennessee, unless the Doradell, in which they owned an interest, was sold to Newport. He took an option on a lot in Copperhill and told Taylor and Mortimer Kauffman, who also owned an interest in the theatre, that Crescent had threatened opening a theatre against him in Newport and he had sold the interest in his theatre to Cheokree "because his mule was scared".

102. Castleberry called on Wm. G. Head on two occasions and asked him if he would be interested in selling his theatre at Greenville, Kentucky. In August 1938, Pittman, the Crescent manager at Central City, pursuant to Stengel's instructions, went to Greenville, Kentucky, and ostentatiously measured a lot for the purpose of giving the impression that Crescent was planning to come into the town. Pittman testified that he did not have to tell anyone in Greenville why he was measuring the lot because "Everybody thought that is what we were going to do, I did not

have to say a word. It is a very small town." In September 1938 Head sold his theatre to Rockwood.

103. In 1937 there were two competing theatres in Central City, Kentucky, the Selba and the Empress. The latter was operated by F. M. Pittman. Rockwood acquired the Selba Theatre in the latter part of 1937 and about a month later Pittman sold the Empress to Rockwood, because he realized that he could not compete with Sudekum.

104. Mr. and Mrs. Caldwell operate the only theatre in Scottsville, Kentucky. On several occasions in 1935, Castleberry called upon them and attempted to purchase their theatre. He described the size, power, and wealth of the Crescent organization to them, and told them that Crescent intended to go into several Kentucky towns, including Elizabethtown, Russellville, Franklin, Glasgow and Scottsville, and also into Gallatin, Tennessee. He threatened that Crescent would build another theatre, secure the choice of films, and drive the Caldwells out of business unless they [fol. 3132] sold their theatre.

105. Arthur Mitchell has operated the only theatre in Russellville, Kentucky, since 1932. During the years 1935-36-37, he was approached on several occasions by Castleberry, who called on him for the purpose of persuading him to sell his theatre to Crescent. During the course of his visits, Castleberry told Mitchell that unless Mitchell sold his theatre, Crescent would build a second theatre in the town, that if they built a theatre, they could buy all the film on the market, that Crescent had over 100 theatres and $4,000,000.00 in cash, and that the boss wanted some action in Russellville.

During this period, Castleberry visited Russellville frequently and examined and made inquiries concerning sites for theatre construction and buildings which could be converted into theatres. He told M. O. Duncan, a druggist in Russellville, that Crescent would put up a show as soon as they had a location and run "Mitch" out of business. Castleberry later admitted to Mitchell that he had done these things in order to bluff Mitchell into selling his theatre to Crescent.

106. Carl Hutton has operated the Jefferson Theatre in Jefferson City, Tennessee for seven years. In the fall of 1936 Hendren called upon him and told him that unless he

leased his theatre to Cherokee they would build a theatre in Jefferson City twice as large as the Jefferson. Hendren then proceeded to outline the manner in which Cherokee would operate this theatre in order to drive the Jefferson Theatre out of business, which included running on a 10 and 15-cent admission policy, operating at a loss for a year or even two years, and, as a result of the Crescent buying power, securing the most desirable product. On subsequent occasions threats of a substantially similar nature were made by Hendren, Fred Gorman and Stengel to Hutton, his father, T. C. Hutton, and C. T. Rankin, who owned a mortgage on the Jefferson Theatre. On one occasion Gorman took the Huttons to see Sudekum who told them he felt it would be to their best interests to get together with Cherokee. He referred to other towns in which he had eliminated competition by putting up a new theatre and conducting a good operation, and intimated that unless the Huttons leased their theatre to Cherokee, a new theatre [fol. 3133] would be built in Jefferson City. Hutton refused to lease his theatre despite Cherokee's threats and he has not been approached since 1937.

107. Guy B. Amis operates the only theatre in Lexington, Tennessee, and was operating it in 1937; early in 1937 Castleberry and Stengel called on Amis on two occasions and told him that they intended to operate a theatre in Lexington. They stated that unless he sold his theatre to them they would build a new theatre in town. Shortly thereafter Ruffin called on Amis and offered to buy his theatre for $20,000.00. He told Amis it would be much better for him to sell his theatre than to have opposition and be forced out of business; Amis declined to sell.

108. Mike Brown has been operating the only theatre in Livingston, Tennessee, for the past sixteen years. The theatre which he now operates (the Ritz) was built in 1937. Early in 1939, Castleberry called on Mr. and Mrs. Brown. He told Mr. Brown that he understood that the Crescent Amusement Company had a lease on his theatre. When Brown told him that he was sure they did not have, Castleberry replied: "It may be another house here in town." Castleberry asked Mrs. Brown if they would sell either all or a part of their theatre and asked if they would rather be affiliated with Crescent than have a house built across the square.

109. In March 1939 Ruffin was operating one theatre in Hickman, Kentucky, and Joe Wiley began to convert a building in to a second theatre. Shortly after Wiley commenced with his remodeling, Ruffin commenced converting another building into a theatre. When Wiley decided that Ruffin was going to open a second theatre he dropped his plans to open a theatre in Hickman: Ruffin's new theatre, the Rex, operated seven days a week for a short period and then went to a two-day-a-week operation, after which it was closed. On August 12, 1939, Ruffin wrote Stengel regarding their new theatre in Hickman as follows (Ex. [fol. 3134] 245):

> "As we will need equipment for our new theatre at Benton, do you think it would be advisable and safe to consider dismantling this theatre so as to use some of this equipment at Benton, or forget our investment at Hickman and keep same intact for assurance against competition? I would welcome any and all suggestions that you may have to offer."

Stengel replied that both he and Mr. Sudekum thought that the house should be closed but the equipment should not be removed in case they wanted to reopen it if conditions improved.

110. Decatur, Alabama, has two distinct business sections, the Second Avenue and the Bank Street district. For several years Crescent has operated two theatres in the Second Avenue section; the Bank Street section did not have a theatre until January 1941.

In October 1940, H. R. Mitchell, who had formerly operated a theatre in Linden, Alabama, became interested in opening a theatre in the Bank Street district of Decatur. On October 30, 1940, he leased a building in that section and arranged for its conversion into a theatre. On November 4, 1940, Sudekum announced that Crescent would construct a theatre on Bank Street, and on November 12, the Decatur daily newspaper carried an article announcing that remodeling of the building which Crescent had selected had been commenced. Mitchell thereupon dropped his plans to open a theatre in Decatur. The new Crescent theatre was opened around January 1, 1941.

111. The theatres maintained by the defendant exhibitors and their affiliates in the towns in which they operate are

modern and up-to-date in their appointments; are attractive in appearance, for the most part have been originally built as motion picture theatres, have adequate seating capacity, and the equipment and buildings are well maintained. They have large sums invested in buildings and equipment. The management is competent and experienced. The exhibitor defendants and their affiliates are adequately financed, are financially responsible, have stabilized the op- [fol. 3135] eration of motion picture theatres in the small towns in the area in which they operate, and have the reputation of playing out their contracts as agreed.

112. For the most part theatres operated by independents in competition with the defendant exhibitors and their affiliates have been greatly inferior to those operated by the defendant exhibitors or their affiliates in the several competitive situations. Usually the theatre building was a converted store building, not built for the purposes of a theatre, unattractive in appearance, and inadequate in modern conveniences. In many instances the equipment has been second hand. Some operations have been inadequately financed, and in a number of cases there was no stability of operation in these independent situations.

The distributors have found it necessary by reason of this instability of operation and inadequate financing in some instances, to make large concessions from the contract terms originally agreed upon, or to accept cancellations of obligations to exhibit pictures as originally called for under the contract.

D—Profits

113. During the five-year period immediately preceding the suit, the Crescent and Rockwood companies each experienced a phenomenal growth in earnings and surplus which was out of all proportion to the increase in gross receipts and gross assets resulting from physical expansion of the business and improving general economic conditions. During the five-year fiscal period from June 30, 1934 to June 30, 1939, Crescent's total assets were less than doubled, but its surplus was increased thirty times. During the last fiscal year of said period its gross receipts were less than twice the amount of its gross receipts for the first fiscal year of said period, but its net profits (exclusive of dividends received) were more than five times those of the first year. During the five-year period, its net earnings

(exclusive of dividends received) averaged about 35 per cent per annum, on its capitalization.
[fol. 3136] During the three calendar years 1937 to 1939, inclusive, (Rockwood was organized in February 1936), Rockwood's total assets approximately tripled, but its surplus increased about eight times. During the calendar year 1939, its gross receipts were somewhat less than three times its gross receipts during the calendar year 1937, but its net earnings (exclusive of dividends received) for 1939 were thirty-one times what they were for 1937. During this three-year period, its net earnings per annum (exclusive of dividends received), averaged about twelve times its original capital investment. (Ex. 308). Sudekum and Stengel were also able to profit personally from the absorption of competitors by securing the payment of substantial salaries from the corporations which they formed to take over competing theatres, in addition to their regular compensation from Crescent and Rockwood.

E—Franchises

114. The ordinary film licensing agreement covers a single season's product. The franchises in question have granted certain exclusive film licensing privileges for continuous periods of five years (Paramount), six years (Fox), and twelve years (Warner), respectively.

The Paramount Franchise

115. The current franchise with Crescent and Rockwood and their subsidiaries is embodied in three documents, each dated July 28, 1938, as of November 20, 1937. One covers first run at the Paramount Theatre in Nashville (Ex. P. 30), a second covers the Crescent and Lyric theatres outside of Nashville and subsequent runs in Nashville (Ex. p. 24, p. 40), and the third covers the Rockwood situations, including those operated by subsidiaries as well as those operated by Rockwood directly (Ex. p. 29). Each has a paragraph which makes a refusal or failure to perform any one of the three agreements a refusal or failure to perform the other two for purposes of cancellation or termination by Para-
[fol. 3137] mount. They were negotiated by Sudekum and Stengel for the exhibitors with Oscar Morgan, southern district manager, for Paramount and cover a five-year term commencing with the 1937-38 season and ending with the

1942-43 season, which coincides with the five-year term under which the Paramount Theatre in Nashville is leased for operation by Crescent.

The background of this franchise goes back to the time when Paramount leased its Nashville theatre to another partner, Mr. Bob Wilby, to operate. This was apparently about 1932, as Morgan explained he was unable to make a deal with Sudekum for the 1932-33, 1933-3- or 1934-35 product because of Sudekum's grievance over the licensing of this theatre to Wilby, instead of to him. Although he never told Morgan he wouldn't buy Paramount films for the Crescent theatre, Sudekum merely offered an unattractive rental. In any event, Morgan finally suggested that the theatre department would be favorably inclined toward a deal for the theatre with Sudekum if he bought the Paramount product, for his circuit, so he bought the product for the 1935-36 season for the Crescent situations, with the results on his competition at Brownsville, Paris and Earlington heretofore stated. As the theatre deal did not go through, Sudekum left Paramount out of the Crescent and Rockwood situations for the 1936-37 season.

Morgan then began negotiating a three-year deal beginning with the 1936-37 season as a three-year deal with the theatre department was then in the making for the operation by Sudekum of the Paramount Theatre in Nashville. When the latter was switched to a five-year deal, the franchise negotiations switched to five years.

116. The general conditions in the three documents are stated in substantially identical form, the only variations appearing in the description of the situation covered and the rental, run and clearance terms. They all cover all of the features released by Paramount from August 1, 1937, to August 1, 1942, except re-issues, foreign-made features produced by companies not affiliated with Paramount, and such features made by other producers which have [fol. 3138] the privilege of approving distribution terms, as Paramount may be unable to secure approval for. The first-run Nashville franchise is to terminate if the Crescent sub-lease or the Paramount Theatre terminates prior to expiration date.

117. The first-run Nashville agreement (Ex. P. 29) provides for fixing rental terms for the last four years by agreement and by arbitration if no agreement is reached.

The basis for what is regarded as a fair rental is stated in the following requirement that the terms "shall be not less favorable to Paramount than the general terms and conditions upon which such photoplays shall be generally exhibited" during the four-year period in theatres located in the southern states and operated by Paramount or its subsidiaries (Ex. P. 30). The effect of the franchise and Paramount Theatre lease was thus to create a virtual partnership between Paramount and Crescent in Nashville during the five-year period comparable to the relationship obtaining between Paramount and theatre-operating companies affiliated with Paramount and theatre-operating companies affiliated with Paramount through stock ownership. Morgan referred to the franchise itself as making them "moral partners."

Exhibit P. 24 licenses the features for first-run exhibition in all of the Crescent towns outside of Nashville, and for second and subsequent runs in the Crescent theatres in Nashville. By a rider (Ex. P. 40), Huntsville, operated by Lyric, was also included.

The only second or subsequent runs licensed by this agreement are those for the Crescent theatres in Nashville.

A repeat-run option is granted by Paragraph 8 (e), which reads as follows:

> "The Exhibitor may at its election exhibit for repeat exhibition any of the feature photoplays licensed hereunder at any theatre covered by this agreement upon the same terms and conditions applicable to the Hopalong Cassidy feature photoplays in respect of such theatre, as set forth in the annexed Schedule A, and the Exhibitor agrees to pay as license fees for each feature photoplays during each such repeat exhibition the license fees payable hereunder for the said Hopalong Cassidy feature photoplays." (Ex. P. 24)

The annexed Schedule "A" provides a rental of $10.00 or [fol. 3139] $12.50 for the Hopalong Cassidy's, depending on the size of the town. The same schedule calls for a rental of 40 per cent on the top four features in all towns with the balance at varying flat rentals, the lowest of which is generally substantially higher than the Hopalong rental. Over the last four years a gradual increase is provided in

all features except the four at 40 per cent and the Hopalong Cassidy's which remain the same.

Schedule "C" lists the clearance applicable to the franchise as follows:

"*Alabama City, Ala.* Prior run over Attalla, Alabama.

Bowling Green, Ky. 30 days over Glasgow.

Brownsville, Tenn. 1937-38 prior run over Bells. Remaining four years 14 days over Bells.

Columbia, Tenn. 30 days over Mt. Pleasant, Tenn.

Dyersburg, Tenn. 1937-38—prior run over Dresden. Remaining four years 14 days.

Gadsden, Ala. 30 days over Attalla, Alabama.

Gallatin, Tenn. 30 days over Portland and Hartsville.

Harriman, Tenn. 60 days over Spring City and Kingston.

Lebanon, Tenn. 30 days over Hartsville, 14 days over Old Hickory and Dupontonia. 60 days over Watertown and Alexandria.

Madisonville, Ky. 1937-38—7 days after Earlington. Remaining four years seven days over Earlington.

Murfreesboro, Tenn. 60 days over Woodbury.

Springfield, Tenn. 60 days over Portland.

Union City, Tenn. 1937-38 prior run over Dresden —remaining four years 14 days."

This schedule froze the playing positions of sixteen towns behind Crescent towns for a five-year period regardless of the character of theatres that might be operated there.

118. The Rockwood franchise (Ex. P. 29) covered first [fol. 3140] run on all of the features released during the same five-year period in all of the eight towns operated by Rockwood directly, the two operated by Hartselle, one by Newport (Copperhill had not then been acquired) two by Mid-State, one by Kentucky, six by Cherokee, four by Ruffin, and three by Chickasaw. The exhibitor is committed to play not less than forty features and six Hopalong Cassidy's in all of the towns except Central City, Kentucky, where the commitment is for fifty-two (Ex. P. 29, p. 3). The features to be exhibited are to be selected "within sixty days after the national release of each such feature," (Ex. P. 29, P. 17).

The Hopalong Cassidy rental is $8.00 for each of these situations. The features are licensed four at 40 per cent and the remainder at varying flat rentals, the lowest being $8.00. A gradual increase over the last four years is provided except for the Hopalong and per centage pictures.

Schedule "C" provides clearance as follows:

"*Coal Creek, Tenn.* 30 days over Norris and Briceville,

Guthrie, Ky. 14 days over Elkton.

Huntingdon, Tenn. 1937-38 to play after McKenzie with prior run over Camden. Remaining four years 14 days over McKenzie and Camden.

Manchester, Tenn. 14 days over Woodbury.

Rockwood, Tenn. 30 days over Spring City and Kingston.

Tracy City, Tenn. 30 days over Palmer and Monteagle 7 days over Sewanee.

Russellville, Ala. 14 days over Haleyville.

Dickson, Tenn. 1937-38 prior run over Waverly—Remaining four years 14 days over Waverly.

Cookeville, Tenn. No town within radius of 35 miles to have clearance over Cookeville. 30 days over Monterey, Tenn. 14 days over Livingston.

Carthage, Tenn. 30 days over Hartsville. No town within 35 mile radius to have clearance over Carthage. [fol. 3141] Erwin, Tenn.; La Follette, Tenn.; Lenoir City, Tenn.; Sweetwater, Tenn.; Oneida, Tenn.; Spruce Pine, N. C.; Newport, Tenn.; Covington, Tenn. No town within radius of 25 miles to have clearance over these towns.

Martin, Tenn. 1937-38 Prior run over Dresden; last four years 14 days clearance over Dresden.

Newbern, Tenn. Prior run over Dyer, Tenn. 1937-38 season; remaining four years 14 days over Dyer.

Alamo, Tenn. 1937-38 protection as agreed upon with Memphis Exchange. Last four years prior run over Bells.

Greenfield, Tenn. Prior run over Dresden and Dyer.

Milan, Tenn.; Humboldt, Tenn. 1937-38 prior run over Dyer, Bells and Trenton. Last four years 14 days over these towns.

Elizabethtown, Ky. Starting 1938-39 for last four years 14 days over Hodgenville."

The effect of the franchise (ex. P. 24, P. 29, and P. 30), on the independent competition at Dresden, Earlington, Gallatin, McKenzie, Spruce Pine, Union City, Hopkinsville, Gadsden, Morristown, Harriman, Newport and Mt. Pleasant has already been recounted. Morgan, in negotiating it, knew precisely what its effect on those independent accounts would be.

119. The repeat-run clause in the franchise was completely effective in preventing the sale of a second-run of any Paramount features to any opposition theatre, as shown by the experience of Smith, Anderson and Henry when they tried to buy a second-run. As Morgan described its effect in a letter to Unger, his immediate superior, on November 14, 1938, (Ex. 152):

> "In any event, the only way we could sell second run, even if we wanted to in these particular towns, (Harriman, Morristown, and Newport) would be after Sudekum had taken the refusal, because Paragraph E of Article 8 of the Crescent Amusement Company franchise provides he can repeat any feature at a given price."

[fol. 3142] The repeat-run clause was apparently never brought to the attention of Agnew, the general sales manager, until this trial, and even after Unger suggested a modification, the only thing that was done was to make Crescent and Rockwood exercise the option within a fixed period of time. The clause, as modified, still prevents the sale of a second-run to the opposition. That Stengel regarded the modified repeat-run clause as granting him an option on second-run is shown by his letter of general instructions to Ruffin, dated May 9, 1939 (Ex. 244), in which he says:

> "We have today signed a rider to the effect that we agree to notify Paramount within thirty days after the conclusion of the initial exhibition of each feature photoplay in any theatre as to whether or not this picture is to be used second run in the particular theatre or town."

The modification, as originally proposed by Paramount, provided that the exhibitor must select and play the features within ninety days of the conclusion of the first-run exhibition. Stengel, in a letter to Kirby on June 9, 1939

(Ex. 34), asked that a qualifying clause be inserted which would provide that "if we are unable to mutually agree on a repeat run date within the ninety-day period, then in that event we will be permitted to play the picture in question as soon after the ninety day period as dates can be made available." Morgan replied on June 19, 1939 (Ex. 348), as follows:

"DEAR KERMIT:

"I have read your letter of June 9th to John Kirby about the rider as affected by the 90-day period in which you are to play your repeats. While the Legal Department wanted a shorter space of time, I finally explained the matter to them—but after all, Kermit, there are two sides to everything, and I think maybe you are drawing a line too fine.

"I think it would be advisable for you to agree to the rider as we have drawn it, because certainly we can agree on repeat dates within the period mentioned, but while you are so insistent on being protected, we want the same right of being protected. As a matter of fact, Kermit, the new Trade Practice Agreement provides that an exhibitor must agree to select his [fol. 3143] pictures on repeats or Short sales within 21 days after availability—so you can understand that we are being far more liberal than that. I don't feel that you need worry about the problems you brought out in your letter, as over the last two years, you will find I am sure, that you had no difficulty on the very thing you're talking about.

"Finally, after all, under the franchise, we are supposed to be some form of moral partners, and it is to the advantage of both of us to work together. Frankly, I would rather not for many reasons, change the rider, and will greatly appreciate it if you will therefore sign and send through to John's office."

The legal department declined to accept the qualifying paragraphs submitted by Stengel, which might have extended the repeat-run privilege indefinitely where there was a failure to agree on a date within the 90-day period, but finally agreed to a specific extension of the 90-day period

to 120 days, the clause finally reading as follows, when forwarded to New York by Morgan on September 7, 1939:

> "With respect to each theatre licensed hereunder the exhibitor shall notify Paramount in writing of its election to exhibit any feature photoplay for repeat exhibition at such theatre not later than thirty (30) days after the conclusion of the initial exhibition of each such feature photoplay at any such theatre, and such repeat exhibition shall be held within one hundred and twenty (120) days from the conclusion of the initial exhibition of such photoplay. It is agreed that Paramount will have prints for each feature photoplay available for booking by the exhibitor for such repeat exhibition during the aforesaid one hundred and twenty (120) days. If no such prints shall be available on the dates selected by the exhibitor, then the time of the exhibitor to exhibit shall be within fifteen (15) days after such prints shall become available. If the exhibitor shall fail to so notify Paramount in writing of its election, then and in such event, upon the expiration of thirty (30) days following the conclusion of the initial exhibition of such photoplay the exhibitor's license to exhibit such photoplay for a repeat exhibition shall thereupon forthwith terminate and revert to Paramount and Paramount may license the exhibition of such photoplay when and where desired by it.
>
> "If the exhibitor shall have elected as aforesaid to exhibit for repeat exhibition any photoplay and shall fail to so exhibit such photoplay within the aforesaid period of one hundred and twenty (120) days, the license fee for each such photoplay shall thereupon forthwith become due and payable to Paramount and [fol. 3144] the exhibitor's license to exhibit such photoplay for repeat exhibition shall forthwith terminate and revert to Paramount, and Paramount may license the exhibition of such photoplay when and where desired by it without accounting to or crediting the exhibitor for any sums received therefor." (Ex. P. 24)

The effect of the modification, as finally drafted, was simply to limit the maximum period during which the clause could prevent a competing theatre from playing a picture used by Crescent first run to a period of 120 days after

its first run, if Crescent elected to repeat the picture, and 30 days if it decided not to repeat it.

Morgan testified he was unable to recall any other clause attached to a franchise which had the same terms as this one. Of the "many contracts giving the exhibitor the right to repeat at a certain film rental" which he had written, he could recall none used in a situation where the exhibitor had a competitor trying to get Paramount pictures. Any exhibitor's repeat-run option is obviously undesirable from the standpoint of the distributor, where competition exists, as it obligates the distributor to make prints available on an additional run without any assurance of additional film rental.

Thus the price paid by Paramount for an assured outlet in the circuit involved not only the elimination of the competition of the Paramount Theatre in Nashville with Crescent's theatres but the complete elimination of any second as well as first-run competition in licensing Paramount films in all of the Crescent and Rockwood situations outside of Nashville, as well.

The franchise was contrary to the general policy with respect to franchises then pursued by Paramount, but was approved by Agnew because of the exceptional circumstances involved. The principal exceptional circumstances was, of course, that Sudekum had built up a circuit which had virtually eliminated all competition, and there was no way to get in that circuit and stay in without leasing him the Paramount Theatre in Nashville on a partnership [fol. 3145] basis, and treating him like a partner in promoting his theatre business outside of Nashville, as well, at the expense of Sudekum's independent competition.

The Warner Franchises

120. On November 25, 1930, Crescent entered into an agreement with Warner Brothers Pictures, Inc. (Ex. W. 18), whereby the latter, which was then contemplating the erection of a first-run theatre in Nashville on the Odd Fellows' property, obtained an option to purchase all of the theatre properties then owned by Crescent, both in and outside of Nashville (Annex Two and Annex Three) and all of Crescent's stock in other theatre operating corporations, including the defendants Cumberland and Lyric and Muscle Shoals Theatres, Inc., (Annex Four) on or

before December 1932. By an agreement dated November 24, 1930, (Ex. W. 15), Warner's sales subsidiary, Vitagraph, Inc., gave Crescent's franchise covering the exhibition of Warner and First National pictures released during the 1930-31 and 1931-32 season. The franchise provided for selection of 26 of the features released each season for exhibiton on first run on percentage terms in all of the towns where Crescent was then operating (Schedules A and B, p. 1). It contained no second run commitment or repeat-run option clause. By a supplementary agreement dated January 18, 1933 (Ex. W. 16), the date for closing of the purchase of the Crescent theatre interests pursuant to the option given on November 25, 1930, was extended to February 1935, and the terms with respect to the Nashville properties were modified. By the same agreement, the franchise was extended for a five-year period, and the extension "shall apply to all motion pictures, photoplays, etc., now being released or distributed by Warner and/or its affiliated or subsidiary companies and those which may be heretofore released or distributed by it or them, during the extended period."

[fol. 3146] By an agreement dated August 15, 1935, (W. 17) a settlement was made between Crescent and Warner disposing of certain law suits which had arisen out of the controversy over alleged non-performance by both parties of the purchase agreement in February 1935, by which settlement agreement Warner was released from any obligation to take over the Crescent theatre interests and agreed that it would not, prior to December 31, 1939, use or lease its property in Nashville for a moving picture theatre without Crescent's consent. The franchise was, by the same agreement, also extended to December 31, 1939.

What happened in Brownsville, Hopkinsville, Newport and Rogersville has already been recited. Crescent also took 1935-36 Warner product away from Parrott and Hendren at Greenville.

121. The current franchise picked up where the old franchise left off, commencing with the 1939-40 season and ending with the 1942-43 season. Having been placed in final form after the filing of this suit, it was not included in one document but took the form of separate contracts for each town covered, all dated March 1, 1940, and approved by the distributor on March 14, 1940, (Ex. W. 14). These

contracts cover the Crescent, Lyric, Hartselle, Muscle Shoals, and Rockwood towns, the latter including those of its subsidiaries, Lawrenceburg, Dickson, Mid-State, Ruffin, Chickasaw, Kentucky and Cherokee, and Cherokee's subsidiary, Newport, for the seasons 1939-40 to 1942-43, inclusive.

The order of negotiation seems to have been as follows, an agreement in principle in November 1939, by Kalmenson with Stengel and Sudekum on the Crescent situations, with details, such as clearance and repeat runs, on Crescent, and the Rockwood deal left to be worked out by the branch managers with Stengel. At the same time, Kalmenson promised Sudekum that Warners would work out a franchise for the Muscle Shoals towns. Sudekum later stated to Atlanta branch manager McCoy that "he did not want to include the Muscle Shoals theatres with his franchise [fol. 3147] on account of the pending law suit, but that he did want to work out a separate franchise the same with the other town as with Louis Rosenbaum" (Ex. 198), and McCoy then worked out the Muscle Shoals deal with Rosenbaum. In any event, the franchise was obviously a single transaction insofar as Warner was concerned. However, the Crescent and Rockwood contracts were not signed by Sudekum and Stengel until after that date, and Rosenbaum's approved contracts were not forwarded to him until April 1940.

122. The former franchise for the Crescent towns covered Warner product of the 1939-40 season released prior to January 1, 1940. The current franchise, insofar as it related to the towns covered by the former franchise, therefore, does not cover the entire year's product for 1939-40, but only 31 features. For the three succeeding seasons, all features released each season are covered. For all of the other situations, the franchise covers the entire 1939-40 season's feature product, as well as the entire feature product for the three succeeding years.

The following feature rental terms are identical for the towns of Cleveland, Columbia, Decatur, Dyersburg, Greenville, Hopkinsville, Madisonville, Maryville, Murfreesboro, Paris and Union City, in all of which the films were licensed for exhibition in either of the two theatres then operated in each of those towns by Crescent. For the last three seasons, 24 features are to be played first run on per-

centage, and the balance of those released are to be played first run at varying flat rentals. Twenty features are licensed for a second run at $12.50 each. Each contract carries the following rider, copied from the Cleveland contract, with only the name of the town changed:

> [fol. 3148] "The twenty (20) features licensed for second run exhibition shall be selected by Exhibitor from the features licensed, first run, for each of the motion picture seasons 1939-40, 1940-41, 1941-42, and 1942-43, in the following manner:
>
> Within thirty (30) days after the last date of the Exhibition of any feature, first run, Exhibitor will notify Distributor in writing whether Exhibitor selects such feature for second run exhibition. Failure on Exhibitor's part to so advise within said period with respect to any feature shall be regarded as a rejection by Exhibitor of such feature for second run exhibition. Any feature rejected as herein provided may be disposed of by Distributor elsewhere as and when it deems advisable.
>
> Exhibitor shall have the right to exhibit any reissues, except Westerns, at the lowest allocated rentals, and in such event the Exhibitor's commitment to exhibit the features in the lowest rental classification shall be reduced accordingly.
>
> Should Exhibitor's playing time be reduced by reason of the closing of a theatre, then Exhibitor's commitment shall be reduced proportionately.
>
> In event one theatre closes, exhibitor shall have the right to repeat any feature at the lowest allocated rentals subject to all runs and clearance which may now exist or may hereafter be granted to other exhibitors in Cleveland, Tennessee, and in such event the Exhibitor's commitment to exhibit the features in the lowest rental classification shall be reduced accordingly." (Ex. W. 14).

Each of these two-theatre towns was large enough for possible competition from independent theatres and such competition had actually been encountered in Cleveland,

Decatur, Greenville, Hopkinsville, Maryville, Paris and Union City.

The feature licensed first-run for the last three seasons were "all features released for each season." Thus, although only 20 features were licensed for second-run, each feature released was tied up until 30 days after its first run by this agreement, at which time Crescent might decide to play the picture second run or reject it so that it could be licensed to another exhibitor. In this way, the only second run a competitor in those towns could buy would be second [fol. 3149] run of the features that Crescent didn't think were good enough for a second run, and the decision as to which pictures he got would be entirely up to Crescent.

Crescent was not committed to play a second run at all if it decided to close one theatre in these situations as the next to the last paragraph provides that if Crescent closes one of its two theatres, its commitment is reduced proportionately, that is to say, cut in half. The second-run commitment, 20 pictures at $12.50, or $250.00 is obviously less than half of the total commitment (Ex. W. 14), as the pictures in the first-run flat rental brackets alone always substantially exceed the second-run total and a reduction of half in the commitment would eliminate the second-run commitment entirely.

But even with one theatre closed and its second-run commitment out of the way, the exhibitors obviously wished to still be in a position to prevent a competitor from getting a second run. The last paragraph, giving a repeat-run option where one theatre is closed, was plainly in addition to the rider insisted upon by the exhibitors, as it confers no rights or advantages on the distributor. Unlike the Paramount repeat-run clause, this option was so worded as to make the repeat-run subject to such other runs in the same town as the distributor might license. The only purpose that this clause could serve was to make it difficult for Warner to license a second-run theatre in opposition to Crescent after Crescent shut one theatre and got rid of its second-run commitment.

The purpose of the repeat-run option was plainly to replace the second-run commitment as a means of tying up second run in the situations where that commitment was subject to elimination upon closing a theatre, as in the situations where no second-run commitment was made, a straight repeat-run privilege was inserted which does not

depend on the closing of a theatre to take effect. Thus in Harriman and Morristown, where Crescent was also operating two theatres, but no second-run commitment was [fol. 3150] made, the repeat-run clause reads as follows:

> "KCS. [In the event one theatre closes]* Exhibitor shall have the right to repeat any feature at the lowest allocated rentals subject to all runs and clearance which may now exist or may hereafter be granted to other exhibitors in Harriman, Tennessee, and in such event the exhibitors commitment to exhibit such features in the lowest rental classification shall be reduced accordingly."

The only difference between this and the repeat-run clause previously quoted is in the stricken opening phrase: "In the event one theatre closes". In all of the one-theatre situations in which no second run was bought, the same unqualified repeat-run clause as that stated above was used.

123. The only Crescent situations outside of Nashville, in which no repeat-run clause was included, were Bowling Green, Kentucky, (Ex. W. 17), and Gadsden, Alabama, (Ex. W. 7), where the Crescent circuit bought a first and second-run to be played in any one of its three theatres in each town. The other terms were the same here as in the other Crescent situations noted above, including the same clause for a proportionate reduction of the commitment upon closing of a theatre. But if Crescent closed a theatre in Bowling Green or Gadsden, it would still have two theatres operating, one of which could take care of the second-run commitment and there was, therefore, no need for a repeat-run clause to take the place of an eliminated second run.

In Nashville, all of the features were licensed for first-run at the Knickerbocker or Fifth Avenue or Princess or Rex on a percentage basis. A selection of 25 features each season is licensed for a subsequent run at each of the following theatres at a flat rental of $10.00 each: Belle Meade, Belmont, Capitol, Elite-West, Madison, Roxy, State and Woodbine. None of the Nashville contracts contains a repeat-run clause.

124. In the Rockwood towns, first run of the Warner product was tied up for the four-year period by a commit-

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[* Words enclosed in brackets erased in copy.]

[fol. 3151] ment to play only "a selection of 26 each season." No second-run commitment was made in any situation. The manner in which those features were to be selected and the repeat-run privilege are stated in a uniform rider as follows:

"The features and short subjects licensed hereunder shall be selected by Exhibitor in the following manner:

Within thirty (30) days from the date of each availability notice, Exhibitor will notify Distributor in writing whether Exhibitor selects or rejects the features and short subjects listed in such availability notice. Failure on Exhibitor's part to so advise within said period shall be regarded as selection by Exhibitor of said features and short subjects. Any features and short subjects rejected as herein provided may be disposed of by Distributor elsewhere as and when Distributor deems advisable.

Exhibitor shall have the right to exhibit any reissues except Westerns, at the rental specified above for features, and in such event the Exhibitor's commitment shall be reduced accordingly.

Exhibitor shall have the right to repeat any feature at the rental specified above for features, subject to all runs and clearance which may now exist or may hereafter be granted to other exhibitors in Alamo, Tennessee, and in such event the Exhibitor's commitment shall be reduced accordingly.

Should Exhibitor's playing time be reduced by reason of the closing of said theatre, then Exhibitor's commitment shall be reduced proportionately."

The flat rental for these features was fixed at $10.00 in each of the following towns: Alamo (Chickasaw), Benton, Kentucky, (Chickasaw), Brownsville, (Cherokee,) Carthage (Mid-State), Central City, Kentucky, (Rockwood,) Cowan (Rockwood), Greenfield, (Ruffin) Guthrie, Kentucky, (Rockwood) Halls, (Chickasaw), Hartselle, Alabama, (Hartselle), Huntingdon, (Rockwood), Lake City (Rockwood,) Madisonville, (Cherokee) Marshall, North Carolina (Cherokee) Manchester, (Rockwood) Oneida, (Cherokee), Providence, Kentucky, (Rockwood) Rockwood, (Rockwood), Rogersville (Rockwood), Russellville, Alabama, (Hartselle

Tompkinsville, Kentucky, (Mid-State), and Tracy City, (Rockwood). The rental for each of the features was $11.00 in Dickson, (Dickson), Greenville, Kentucky (Rockwood) Lenoir City, (Cherokee), McKenzie (Rockwood), Newbern (Ruffin,) and Spruce Pine, North Carolina (Cherokee.) [fol. 3152] The feature rental terms were four at 35 per cent, four at $20.00, and eighteen at $12.00 for the following towns: Elizabethtown, Kentucky, (Kentucky), Erwin (Cherokee,) Humboldt (Chickasaw), Hickman, Kentucky (Ruffin), LaFollette (Cherokee), Martin, (Ruffin), Milan (Chickasaw), Newport (Newport), and Sweetwater (Cherokee.)

In Cookeville (Mid-State), Copperhill (Newport) and Covington (Ruffin) and Lawrenceburg (Lawrenceburg), 36 features instead of 26 were committed with the top four at 35 per cent and the rest at flat rentals.

The same rider as that quoted above, was attached to all of these situations, with only the name of the town changed and the phrase "rental specified above", contained in the repeat-run clause, altered to "lowest allocated rental" in the situations where there was more than one rental bracket. The repeat-run provisions found in those riders are otherwise identical with those used in those Crescent situations in which no second-run commitment was made. Obviously, the rentals were arbitrarily fixed and allocated among the various Rockwood towns, as no town directly operated by Rockwood paid a rental higher than $11.00, although several towns operated by subsidiaries in which a partner was also interested and which were smaller situations than some of Rockwood's paid much higher rentals. Compare the Rockwood towns of Rockwood, Tennessee, (3,981), Central City, Kentucky (4,199) and Providence, Kentucky (4,397), all playing the 26 selected features at $10.00 each, with Elizabethtown, Kentucky (3,667); Erwin, Tennessee, (3,350) (Cherokee): Hickman, Tennessee, (2,268) (Ruffin); and Newport, Tennessee, (3,575), (Newport,) all playing the 26 selected features as follows: four at 35 per cent, four at $20.00, and 18 at $12.00.

125. Muscle Shoals tied up the first run in its four situations by a "selection of 30 each season" in each town, all to be played at varying flat rentals. No second-run commitment was made and each contract contains the same clause [fol. 3153] as to selection of features for first run as the

Rockwood contracts contained, except that the 30-day period is shortened to 14. A repeat-run clause is also found in each rider which is identical with that contained in these Rockwood and Crescent riders where no second-run commitment is made.

126. On March 17, 1940, McCoy wrote Kalmenson that he had been unable to get the Crescent and Rockwood contracts signed because of changes desired by Sudekum and Stengel (Ex. 199).

Sudekum and Stengel obviously intended to tie up second run in all situations, whether there was existing competition or merely potential opposition. While there was a definite second-run commitment, no repeat-run privilege was necessary for their purpose, and conversely, while there was no definite second-run commitment in effect, a repeat-run privilege was necessary to accomplish their purpose.

What the new franchise does to existing competitive situations is illustrated by the new clearance, incorporated for the first time in it. The only clearance specified in the old franchise is "usual protection". On December 15, 1939, W. C. Hames, Warner Office manager, wrote Stengel as follows:

"With reference to your letter of recent date, enclosing a schedule of clearance that you wanted for your situations, we are enclosing herewith a schedule that we have worked out. This covers your theatres, as well as the Crescent Amusement Company.

We cannot grant clearance that you requested as listed below:

Rockwood, Tenn.	14 days over Spring City.
Columbia, Tenn.	14 days over Mt. Pleasant.
Gadsden, Alabama,	21 days over Attalla, Albertville, Guntersville, Center, Piedmont, Jacksonville, Boaz and Coleville, Alabama.
Alabama City, Ala.,	14 days over Attalla.

"It so happens on all of the above we had already made contracts on our new product, which makes it impossible for us to extend clearance as you have requested."

[fol. 3154] "Won't you please be kind enough to check over the attached schedule very carefully, and if there

is anything that is not satisfactory, you can discuss this with Mr. McCoy as he will be in Nashville sometime the early part of next week."

The precise clearance which Warner said it couldn't grant for Columbia, Gadsden and Alabama City, turned up as requested by Stengel and Sudekum in the final contracts (Exs. W. 14, W.7, W.6). The Columbia and Gadsden clearances were evidently not included until after March 14, 1940, the Warner approval date of the contracts, as in McCoy's letter to Kalmenson of March 17, 1940, he stated that Sudekum's request for these clearances is one of the changes which was holding up the signing of the contracts (Ex. 199). The other clearances contained in the franchise as finally signed are as follows:

Brownsville, Tenn. 14 days over Bells and Summerville
Cookeville, Tenn. 14 days over Monterey
Copperhill, Tenn. 7 days over Blue Ridge, Ga.
Dickson, Tenn. 14 days over Waverly
Earlington, Ky. 14 days over Dawson Springs
Harriman, Tenn. 30 days over Kingston
Humboldt, Tenn. 21 days over Dyer
Huntsville, Ala. 60 days over Mill houses and Y. M. C. A.
Lake City, Tenn. 30 days over Norris, Briceville and Carryville.
Madisonville, Ky. 14 days over Dawson Springs
Manchester, Tenn. 14 days over Woodbury
Milan, Tenn. 21 days over Dyer
Morristown, Tenn. Prior run over Jefferson City
Murfreesboro, Tenn. 30 days over Woodbury
Rockwood, Tenn. 30 days over Kingston
Russellville, Ala. 14 days over Holeyville, Ala.
Tracy City, Tenn. 30 days over Palmer and Mt. Eagle

These clearances were an effective means of controlling Sudekum's competition in nearby cities. None of the clearances granted bore any relation to the film rentals received by Warner as they were not negotiated until after the rentals had been agreed upon.

[fol. 3155] *The Fox Franchises*

127. The first Fox franchise (Exs. F.10, F.11) was negotiated in February and March 1936, and was preceded by circumstances summed up by District Manager Ballance

in a letter to Eastern Sales Manager Kupper on March 13, 1936 as follows:

"As you know we have had a great deal of difficulty with the Sudekum circuit and the procedure in the past has been such that we almost had to take anything that Sudekum wanted to give us. I have been on the verge of splitting with him a time or two, but could not see that I was gaining anything, so always late in the season would take rather unsatisfactory deals.

"However, this year, after repeated efforts to get together with him on any kind of a deal that would show an improvement over anything we received in the past, I closed up and called it a day and attempted to salvage what money I could from a few opposition points, thinking that maybe with Fox out some opposition would open up. He has opposition in the towns of Gadsden and Maryville in the Atlanta territory and in the Memphis territory, he has opposition in Paris, Tennessee. In the Indiana territory, they sell a little bit of a town outside of Madisonville, called Earlington, which George Landis advised me he received a very satisfactory contract from for the K-3 product. In Decatur, he has opposition in a town called Hartselle, which we have sold, but this is all we could salvage; I imagine the whole thing amounted to about seven or eight thousand dollars.

"Since I have sold away from Toney, he has evidenced some desire to get together with us in the future and while it is too late to sell him in some of his spots this year, we have worked out a deal that I think is excellent. I am sending you a recap of the money that we have received, which includes all of the towns in his circuit, for which he buys direct, (he still owns half interest in the Hill Circuit, but this is a separate corporation). This shows the gross total of $24,745.50.

"Briefly, the deal is this:—he is to give us $20,000.00 for half of the K-3 product, but deducting from this, the money he would normally allocate against the towns w-ere we have already sold. In other words, we sell him only half of the K-3 product, but in view of the fact that we receive more from these towns than we have received from Tony, the deal will probably run

up to considerably more than $20,000.00, for the K-3 product.

"The deal for these towns is to be in accordance with the proposed franchise that I am attaching. This is an accumulative 5% increase on K-4, K-5, and K-6, and will have either a weekly, monthly or quarterly payment plan, so that we receive $769.00 a week for the next three years. As a matter of fact, this is a greater increase for him to pay, but he does not like the fact that I am selling what little opposition he has.

[fol. 3156] "Sudekum plays no pictures on percentage. We have never been able to get a percentage and neither does Paramount nor Metro and it is just one thing that he will not go far. As a matter of fact, he has no opposition and is not the best operator in the world and with the big lift that we are receiving from anything we have secured in the past, I think this is an excellent deal and takes care of one of the most troublesome spots that I have almost ever experienced.

"Looking at the past records of what we have received for Fox, I believe you will agree with me that this increase from $24,745.50 to $40,000.00 with a gradual increase each year is pretty good.

"The deal has been agreed upon in principle, but he wants to allocate the money a little differently than he has in the past, but the total will start at $40,000.00, and end at $44,000.00.

"I would appreciate your giving me your thoughts in the matter, or anything else you might want to add to this, but I would like to get it operating as quickly as possible. These are all very small towns, no opposition and some of them are pretty bad looking propositions insofar as gross returns are concerned, although a few of them are pretty good. I do not think I could ever do any better and I am quite sure that I could not go up there "cold" and sell him next year's product at $40,000.00.

I will be in Dallas for several days next week and would like to hear from you as soon as possible." (Ex. 205).

The deal for half of the K-3 product (1935-36 season R. 4261) was made on separate contracts dated March 30, 1936, for Crescent and two Rockwood situations, and on May 15,

1936, for 10 more Crescent situations (Ex. 13). The documents containing the franchise deal (Ex. F, 10) for the Crescent and Rockwood towns and (Ex. F. 11) for the Muscle Shoals towns are dated April 2, 1936, and April 3, 1936, respectively. They cover the three succeeding seasons, 1936-37 to 1938-39, inclusive (K-4, K-5 and K-6).

Even though the independents in the towns where there was then opposition, Earlington, Gadsden, Maryville, Paris and Hartselle, paid Fox more than it received from Sudekum, the total revenue from them added up to only "about seven or eight thousand dollars." The Sudekum franchise offered a total rental of better than $120,000.00 for all situations for the three years' product and that being the case, this product was sold away from the independent exhibitors [fol. 3157] at the "opposition points", who had bought the 1935-36 product, without giving them any opportunity to negotiate for the next season. Everyone of these independents, who paid more than Sudekum in their individual situations but could not collectively match his total Circuit purchase, was eventually taken over by Crescent or Rockwood before the expiration of the franchise in August 1939.

Hendren's letter of February 7, 1936 (Ex. 258), indicates that if he could have gotten the Fox 1936-37 product he would have discontinued negotiations with Sudekum for the sale of Maryville and Greenville. For the 1935-36 feature product in Maryville, he paid $2,456.61 as against $570.00 paid by Crescent for the 1934-35 feature product and $1,080.00 paid by Crescent for the 1936-37 feature product (Ex. 327) in the same town. For the 1935-36 feature product in Greenville, he paid $2,589.00 against $1095.00 paid by Crescent for 1937-38 (Ex. 328).

128. The forty thousand dollar a year deal included the Muscle Shoals, as well as the Crescent situations and was made as a lump sum deal for both companies' theatres. Atlanta branch manager Wilson's letter of April 30, 1936 (Ex. 208) to Mr. Jack Bloom in the contract department at New York, explains how the deal was figured. In that letter he says "To start with the K-4 deal (1936-37 season) represented for the Crescent Amusement Company, the Rockwood Amusement and the Muscle Shoals theatre totaled $40,000.00, and in the same letter he states:

> "I can easily imagine the difficulties you must have had in analyzing the Sudekum deal because I thought

I would go crazy in trying to figure it out, in starting with a lump sum of money and breaking it down into each allocation for each town probably left me a little dizzy."

In explaining the origin of the franchise negotiations, Wilson testified as follows:

"The year before this franchise was made, we did not sell the Sudekum circuit, and sold the opposition houses [fol. 3158] in the towns there was opposition, and it had gotten to a point where it did not look like we would ever make a deal with the Sudekum Circuit; but Mr. Rosenbaum came into Atlanta to arrange a deal for his towns, and we persuaded him to act to see if he couldn't bring the Sudekum circuit and negotiate a deal with us for the entire situation."

Rosenbaum testified that he submitted a three-year franchise proposition to Sudekum on behalf of Paul Wilson, of Fox, after Wilson cut prices down at Rosenbaum's suggestion, and that Sudekum accepted because the prices looked better. Rosenbaum also testified that about the same time he agreed with Fox on a three-year franchise for Muscle Shoals. Then he said that Balance flew down to Florence and wound up the deal there.

129. The deal, as finally made and incorporated in exhibits F. 10 and F. 11, is as follows:

For the Crescent and Rockwood towns, all of the features released during the 1936-37, 1937-38 and 1938-39 seasons were bought first run in all of their situations, except Nashville. The total rentals to be paid by each company in monthly installments each year are as follows:

Year	Rockwood	Crescent	Total
1936-37	$1,624	$33,376	$35,000
1937-38	1,724	35,026	36,750
1938-39	1,864	36,723.50	38,587.50

The rentals allocated for individual theatres are broken down in deal sheets for each town, which have also a minimum commitment for each town of either 40 or 52 features.

The exhibitor is to select the features it will use within 14 days after they become available (p. 8). Paragraph "Eighth" is as follows: "As to any motion picture photoplays that have been exhibited by the exhibitors for regular

exhibition run in any of the theatres mentioned in the deal [fol. 3159] sheets, annexed, said exhibitors shall have the right to exhibit such motion picture photoplays again upon the terms to be mutually agreed upon. It is expressly understood that such privilege shall be granted only in such cases where the repeated exhibition of the motion pictures will not interfere with the clearance granted to any subsequent exhibitor" (pp. 8, 9).

The Crescent clearance granted by the franchise is specified in the deal sheets as follows:

Alabama City, clearance over Attalla, Ala., providing pictures are played within 21 days of national release date.
Columbia, Tenn., clearance over Mt. Pleasant, Tenn.
Decatur, Ala., clearance over Huntsville, Ala.
Gadsden, Ala., clearance over Attalla, Ala., providing first run plays within 21 days of national release date.
Madisonville, clearance over Earlington, Ky.

No second runs were bought in any situations.

For the four Muscle Shoals towns, the same features were licensed first-run, with a minimum commitment of 42 each year in Florence and 36 in Athens, Sheffield and Tuscumbia.

The total rental, to be paid quarterly, is as follows:

1936-37	$5,000.00
1937-38	$5,250.00
1938-39	$5,512.32

Pictures exhibited are to be selected within 14 days after availability. Exhibitor is granted privilege of interchanging Florence, Sheffield, Tuscumbia features (pp. 6, 7).

Clause "Tenth" is a repeat-run provision identical with clause "eighth" in the Crescent-Rockwood franchise.

129. In June 1939, before the expiration of this franchise, Rosenbaum, Sudekum and Stengel negotiated a new one at [fol. 3160] Nashville with Wilson. At the conclusion of the negotiations, on June 27, 1939, Wilson typed out a memorandum of the deal, which memorandum states the terms for all of the Muscle Shoals, Crescent and Rockwood situations (Ex. 286) and signed the original, which he gave to Sudekum or Stengel and gave a copy to the other; Sudekum signed the copy in evidence "Crescent Amusement Co. by Tony Sudekum" and gave it to Wilson. Wilson had pre-

viously given Rosenbaum a signed pencil memorandum of the Muscle Shoals deal (Def. Ex. 94).

Sudekum was aware of all of the negotiations for all of the situations covered when he signed the memorandum. Before it could take final form, this suit intervened and it eventually was embodied in three documents, one for Muscle Shoals (Ex. F. 13), one for Crescent and Lyric (Ex. F. 8), and one for Rockwood and its subsidiaries (Ex. F. 12). As originally proposed, there was one document for Muscle Shoals, and one for Crescent, Rockwood, et al., as in the former deal, but the Crescent-Rockwood document was split into two documents pursuant to Stengel's letter of May 30, 1940 (Ex. 355), "because of present conditions."

130. The new franchise covers the three seasons 1939-40, 1940-41 and 1941-42, first run in all of the Crescent, Lyric, Rockwood and Muscle Shoals towns and contains certain second-run and repeat-run option provisions. All of the Rockwood towns had a minimum commitment of 40 pictures and no second runs were bought for any of them. The deal sheets attached to the agreement covering these towns (Ex. F. 12), which bears the statement on the cover, "Distribution Agreement covering the Sudekum Circuit", "Dated: August 22, 1940", are all dated June 27, 1939. June 27, 1939 is also the date that all of the first-run deal sheets bear which are attached to the agreement giving the Crescent and Lyric terms (Ex. F. 8), which also has the statement on the cover "Distribution Agreement covering the Sude-
[fol. 3161] kum Circuit", but is "Dated: July 31, 1940." The second-run deal sheets attached to this agreement are all dated December 14, 1939.

The Muscle Shoals agreement is dated "as of June 27, 1939" (Ex. F. 13), and the deal sheets attached to it all bear that date. It contains no second-run commitments and contains the same provisions with respect to a repeat-run as that contained in the previous franchise.

However, the Rockwood and Crescent franchises each contain the following repeat-run provisions numbered *Eighth* in each agreement:

> "In any towns in which only one theatre operates regularly (where a definite second-run is not sold) the Exhibitors may play any feature picture as a repeat run and will pay therefor a license fee of fifty per

.cent (50%) of the original license terms, but which license fee shall in no event be less than the prices set forth in the lowest allocation. The Exhibitors agree, however, that they will notify the Distributor within thirty days (30) of the last day of the first run exhibition of their intention to use any picture as a repeat run, and further agree that they will submit exhibition dates for the showing of the picture within sixty days of the last exhibition of the first run. For every repeat run the Exhibitors may, however, eliminate a picture from the lowest classification. It is further understood and agreed that if during the term of this franchise a competitive theatre operates in any village, city or town listed on the attached deal sheets (where a definite second run is not sold) the Exhibitors shall not have the right to exhibit any feature motion pictures as a repeat run" (Ex. F. 12).

Sudekum had experienced some difficulty with second-run opposition during the preceding franchise. Henry had come close to obtaining a second run from Fox in Union City, and Anderson had actually been able to license Fox second run in Hopkinsville. Sudekum had been unable to buy a second run in Gallatin shortly after he opened his theatre there, apparently because Fox did not sell second runs anywhere in towns of that size. The obvious solution to problems of this kind was an unqualified repeat-run option in the new franchise, similar to that obtained from Paramount, which would automatically block the sale of an opposition second run. The memorandum deal (Ex. 286) provided for an optional repeat run in all situations at 50 per cent of the first-run film rental, except where such percentage would not represent a film rental equal to the lowest first-run [fol. 3162] allocation, (Ex. 286) but Ballance refused to accept an unqualified repeat run option. In lieu of that clause, a selective second-run commitment for 26 pictures each year was later negotiated for the larger towns, where there were two or more theatres operated by Crescent, including Hopkinsville and Union City, as set forth in Wilson's letter of January 11, 1940, to Kupper (Ex. 352).

The repeat-run clause that finally appeared in the franchise, therefore, provided for a repeat-run only where a definite second run was not sold and even in these situations, the clause provided that if during the term of the franchise,

a competitive theatre is operated in any situation where a definite second run was not sold, the repeat-run privilege is eliminated. The result was that in the larger situations where there had been second-run competition in the past, they were compelled to make a selective second-run commitment to get protection against that kind of competition on Fox product in the future. In situations where they were unwilling to make even a selective second-run commitment, Fox refused to let them tie up an additional run with a repeat-run option, except during such time as there was no opposition in the towns in question. The obvious restraint on second-run competition resulting from a repeat-run option in towns where there were competing theatres was forcibly brought to the attention of Stengel and Sudekum in the course of the Fox negotiations in November 1939, and the Warner franchise was not finally signed by the exhibitors until after March 17, 1940.

131. In the matter of clearance, the Fox company was also concerned about the legal aspects of the Crescent and Rockwood demands for widespread clearance which their towns had not previously enjoyed. With respect to this subject, Wilson wrote Stengel on November 22, 1939:

[fol. 3163] "This will acknowledge your letter of November 9 to which you attached a letter from Mr. Armistead relative to the clearance clause and repeat-run clause which you want to insert in the franchise. I am answering both of those questions separately.

"As I advised you during our telephone conversation, our attorney from New York was in Atlanta a few weeks ago to secure information to guide him in preparing our defense on the government suit. Upon his return to New York he discussed the matter with our legal department and with Mr. Kupper, and Mr. Kupper wired me, which telegram I read to you over the phone, to the effect that the clearance cannot be changed or made any different from what it was in the previous year.

"Then upon receipt of Mr. Armistead's letter yesterday I discussed the matter at length with Mr. Ballance, who stated that it would not be advisable to change any clearance clause in view of the instructions given us which are as follows: Under no circumstances

is clearance to be changed from that granted previously. You can readily understand that changing these clauses would only mean our continuously defending lawsuits unnecessarily because any clearance that worked out satisfactorily previously should not necessitate any change."

132. The matter of clearance was handled in the franchise finally drawn as follows:

In the following situations, the following specific clearance was granted:

Alabama City, Ala., clearance over Attalla, Ala., providing picture played within 21 days of national release date.
Columbia, Tenn., clearance over Mt. Pleasant, Tenn.
Gadsden, Ala., same as Alabama City, (Ex. F. 8).
Central City, Ky., 60 days over Drakesboro, Ky.
Elizabethtown, Ky., 14 days over Hodgenville, Ky.
Providence, Ky., 30 days over Clay, Ky.

In all other situations, no clearance was specified and the statement "clearance to be agreed upon" was substituted. In no situations was there any clearance against a theatre covered by the franchise, except the Crescent second-run houses in Nashville. This, of course, leaves Fox free to handle the clearances which are of doubtful legality, simply by making prints available in a discriminatory manner without any express statement of clearance, as was done in [fol. 3164] Gadsden, Alabama, with reference to the clearance over the Dixie in East Gadsden, which the Ritz in Alabama City enjoyed.

The result reached in the Fox franchise was thus substantially the same as that accomplished by the Paramount and Warner franchises, insofar as elimination of first and second-run competition and the imposition of arbitrary clearance was concerned.

133. One obvious purpose of all three franchises was to give Fox, Warner, and Paramount an ostensibly valid legal excuse for discriminating in favor of the Sudekum circuit in licensing its films during the period covered in the same manner that they had discriminated in the past. The Sudekum circuit, by virtue of having built up a preponderance of closed situations, through the persistent elimination of competition, was in a position to deal effectively with such

competition as remained or might arise in the future, in making one-year film deals, but franchises offered protection against future changes in those discriminatory practices. In negotiating a consent decree in the New York suit filed on July 20, 1938, the Government exempted from its operation those franchises which had been signed prior to the date the negotiations commenced, June 6, 1940.

F—Columbia:

134. Defendant Columbia Pictures Corporation did not at any time during the period involved in this case combine with the defendant exhibitors herein or any of them unreasonably to restrain interstate trade or commerce in motion picture films or to monopolize or to attempt to monopolize the exhibition of motion pictures in the towns mentioned in the complaint known as Crescent towns in the States of Tennessee, Alabama, Kentucky, Arkansas, Mississippi or North Carolina.

[fol. 3165] 135. Defendant exhibitors have not alone or in combination compelled defendant Columbia to grant to all of any of them in any or all of said Crescent towns, the exclusive privileges during the time said exhibitors have operated theatres in said towns of selecting from the feature pictures released by Columbia such feature pictures as defendant exhibitors deemed suitable for exhibition in said towns as and when prints thereof become available before any of said pictures were released to any other exhibitors in said towns; and said exhibitors have not alone or in combination compelled defendant Columbia to grant to all or any of them in all or any of said Crescent towns the exclusive privilege of receiving clearance on feature pictures over competing theatres in said towns; nor has Columbia granted any of such privileges to said defendant exhibitors.

136. Defendant Columbia has not been dominated, controlled, coerced or influenced by the defendant exhibitors to withhold its feature pictures from independent exhibitors in the said States of Tennessee, Alabama, Kentucky, Arkansas, Mississippi or North Carolina or in so-called Crescent towns or in towns where independent exhibitors were and are in competition with defendant exhibitors, but on the contrary for the period in question the feature pictures pro-

duced and distributed by defendant Columbia were at all times ready and available to independent exhibitors in the so-called Crescent towns and in all towns where independent exhibitors were in active competition with defendant exhibitors in the States of Tennessee, Alabama, Kentucky, Arkansas, Mississippi and North Carolina.

137. For the period in question defendant Columbia made it a practice to give independent exhibitors in Crescent towns, including competitive towns, reasonable rejection privileges in its contracts, as well as fair and reasonable clearance privileges. For example, in Russellville, Kentucky, defendant Columbia entered into eight contracts with Arthur Mitchell, independent operator, for the period in question (Defendant's Exhibit 1 to 8) from which it ap- [fol. 3166] pears that said Mitchell had the right to reject a substantial number of pictures; in Spruce Pine, North Carolina, defendant Columbia Pictures Corporation entered into three contracts with independent exhibitor J. E. Taylor for the period in question (Defendants' Exhibits 10 to 12) from which it appears that the said Taylor had the right to reject a substantial number of pictures; in Mount Pleasant, Tennessee, defendant Columbia entered into eleven contracts with independent exhibitors Rubble B. Page for the period in question (Defendants' Exhibit 13) from which it appears that said Page had the right to reject a substantial number of pictures; in Gallatin, Tennessee, defendant Columbia entered into eighteen contracts with independent exhibitor W. F. Roth for the period in question (Defendants' Exhibit 33) from which it appears that the said Roth had the right to reject a substantial number of pictures.

138. In Mount Pleasant, Tennessee, defendant Columbia did not subject the independent exhibitor Rubble B. Page to clearance in favor of a closely competing town, to-wit, Columbia, Tennessee, in which one of the defendant exhibitors operated a theatre, as appears by the eleven contracts, (Defendants' Exhibit 13). In Dresden, Tennessee, the six contracts made between defendant Columbia and the independent operator W. O. Taylor for the period in question, (Defendants' Exhibit 14), affirmatively contained provisions that no theatre within a radius of fifteen miles of Taylor's theatre was to have protection over him, although some of the defendant exhibitors were operating theatres in

the towns of Martin and Greenfield, Tennessee, which were less than fifteen miles from Dresden, Tennessee. In Earlington, Kentucky, the last two seasons' contracts out of a group of eighteen contracts in evidence (Def. Ex. C35), made during the period in question between defendant Columbia and independent E. W. Dozier, gave said exhibitor fourteen days clearance over a theatre operated by one of the defendant exhibitors in a much larger town located nearby.

139. Defendant Columbia invariably tried to obtain the best rental possible for its pictures for the period in question. In Crescent towns including towns in which inde- [fol. 3167] pendent operators were in competition with some of the defendant exhibitors, defendant Columbia invariably leased its product to such independent exhibitors and refused to sell its products to defendant exhibitors. Specifically such towns and independent exhibitors were:

Gallatin, Tennessee, W. F. Roth.
Earlington, Kentucky, E. W. Dozier.
Rogersville, Tennessee, William P. Miller.
Union City, Tennessee, John D. Henry.
Hopkinsville, Kentucky, Andy Anderson.
Athens, Alabama, Max Buchanan.

140. An independent exhibitor, E. W. Dozier operated a theatre since the season 1931-32 in Earlington, Kentucky, defendant Columbia sold him its entire product for each season from 1931-32 down to 1939-40 (with the exception of the season 1934-35). This town is in competition with Madisonville, Kentucky, situated about seven miles away, in which there is a theatre operated by defendant Crescent Amusement Company, Inc. In January 1934 defendant Columbia in leasing its product to said Dozier for Earlington, Kentucky, inserted a clause therein at Dozier's request to the effect that if it sells Madisonville, Kentucky, said Dozier has the privilege of cancelling the unplayed portion of his contract. (Defendant's Exhibit 73).

141. Defendant Columbia was justified in asking for a deposit from the witness Tim Smith who wanted to buy three seasons' product for the towns of Harriman, Morristown and Newport, Tennessee, in 1938, for the reason that said Tim Smith had entered into a contract with said defendant in 1932 for his theatre in Knoxville and there-

after had refused to perform the same or play any of defendant's pictures mentioned in said contract, or to pay for them; that his financial condition in 1938 was bad.

142. The course of conduct of the defendant Columbia during the period in question showed a willingness on the [fol. 3168] part of said defendant to rent or lease its product freely to independent exhibitors in all the Crescent towns including all competitive towns in the States of Tennessee, Alabama, Kentucky, Arkansas, Mississippi and North Carolina, upon a fair competitive basis as between independent exhibitors themselves and independent exhibitors and defendant exhibitors.

143. The Government failed to prove that defendant Columbia had been guilty of any conspiracy to restrain trade or commerce with the defendant exhibitors or any of them, or that defendant Columbia has committed any of the acts charged in the complaint.

G—Universal Pictures Company, Inc.

144. The defendant, Universal Pictures Company, Inc., is a corporation incorporated under the laws of the State of Delaware, with its executive office in the city of New York. The defendant, Universal Pictures Company is not engaged in the distribution of films.

145. Universal Pictures Company, Inc., did not at any time enter into any contract with any of the defendant exhibitors in this action for the exhibition of films, nor did it enter into any business dealings or relationship of any kind with any of such defendants. Universal Pictures Company, Inc., did not ship, send or make available in any manner any motion picture photoplays to any of the defendant exhibitors in this action, and has not and did not contract, combine or conspire with any of the aforesaid for any purpose whatsoever.

146. Universal Pictures Company, Inc., has not contracted, combined or conspired with any of the defendant exhibitors with the intent or for the purposes mentioned in the bill of complaint.

147. The plaintiff has introduced no proof to sustain any charges in the bill as to Universal Pictures Company, [fol. 3169] Inc., There is no evidence whatsoever to sustain

any charges in the bill of complaint herein as to Universal Pictures Company, Inc.

II—*Universal Film Exchanges, Inc.*

148. Universal Film Exchanges, Inc., does not produce any motion pictures. It distributes in the United States the positive prints of copyrighted motion pictures produced by Universal Pictures Company, Inc.

149. The Universal Film Exchanges, Inc., has not aided the defendant exhibitors in taking over and keeping closed any theatre in any town in which the defendant exhibitors, or their affiliates have operated at any time during the period covered by this lawsuit, and up to the present.

This defendant granted to the defendant exhibitors only such choice of products as their contracts, made in the usual and ordinary course of business, and in the exercise of its independent judgment for securing the greatest amount of revenue from the motion picture films provided.

150. In fixing the price for their product and in granting the privileges of selection and clearance as between the defendant exhibitors and independent or competing operators, Universal Film Exchanges, Inc., acting separately and independenently, and in the exercise of its own business judgment, has at all times attempted to license and has licensed exhibition rights of their respective photoplays so that it would receive from such distribution the largest possible returns consistent with sound business policy and with existing conditions, and without knowledge of the action taken by any other defendant distributors; and without any knowledge of the effect of such action upon competitors of the defendant exhibitors.

151. As to the "other towns" mentioned in paragraph [fol. 3170] 2 (e) of the plaintiff's several bills of particulars, no proof was introduced by the plaintiff which showed or tended to show any discrimination on the part of Universal Film Exchanges, Inc., in the licensing of motion picture films to the independent exhibitors in said towns. On the contrary, where it is mentioned in connection with said independent towns the proof shows that it granted the independent operators the usual and ordinary privileges incident to the licensing of motion picture films in similar towns in the areas covered by this lawsuit.

152. As to the situations mentioned in paragraph 5 (d) of the plaintiff's several bills of particulars addressed to paragraph 48 of the bill, except in the situations hereinafter specially discussed, there is no proof whatsoever in the record on the situations therein mentioned as to Universal Film Exchanges, Inc.

153. Universal Film Exchanges, Inc., contracted with Dozier for the exhibition of their entire product in the Roxy Theatre at Earlington for each of the seasons 1934-35 to 1938-39 inclusive. It did not sell any of its product either to the Crescent Theatre at Madisonville or to the Earl Theatre at Earlington at any time during the period covered by this lawsuit. Its contract with Dozier for 1938-39 gave him fourteen days clearance over Madisonville, and thirty days over second run Earlington.

154. At Brownsville, Tennessee, there is no evidence that Universal Film Exchanges, Inc., sold either Lawing or the Crescent Amusement Company.

At Paris, Tennessee, Lawing made no application for Universal product and it does not appear that the Crescent Amusement Company contracted for Universal Product during the period that it operated in competition with Lawing.

155. There is no evidence that Universal Film Exchanges, Inc., discriminated against either of the independent operators, Parrott & Hendren Amusement Company or Ausmus & Parrott Amusement Company, in Greenville, or Mary- [fol. 3171] ville, Tennessee, in the licensing of films at any time.

156. Universal Film Exchanges, Inc. had sold its product to Crescent Amusement Company at Morristown and Harriman continuously each year, beginning with the 1934-35 season, and its product for those two points was under contract with the Crescent Amusement Company at the time Peerless opened in competition with Crescent at those two towns.

At Newport Universal Film Exchanges Inc. had sold Baird individually prior to acquisition of interest in his theatre by Cherokee Amusement Inc., and continued to sell Newport Amusement Company, Inc. thereafter.

There is no evidence that Peerless Enterprises applied for Universal product at either of the three towns above mentioned at any time, and no evidence that Universal Film

Exchanges, Inc., at any time discriminated against Peerless Enterprises, Inc. in the sale of its product in these towns.

157. There is no evidence in the record as to any discrimination or any dealings on the part of Universal Film Exchanges, Inc., with Ray Smith at Murfreesboro, Tenn. Ray Smith operates a theatre at McMinville, Tennessee, in competition with Cumberland Amusement Company. There is no testimony as to any theatre operation at McMinville, Tennessee, by James R. Wilson.

158. Universal Film Exchanges, Inc., now sells and has sold its product at McMinville, to Ray Smith for a number of years, and does not sell Cumberland Amusement Company at that point. There is no evidence that Universal Film Exchanges, Inc., has discriminated against him in any way.

159. Roth at Gallatin, Tennessee, had difficulty with Universal Film Exchanges, Inc., in 1928, and has neither bought nor tried to buy its product since that time.

160. William Griffith Head operated a theatre in Greenville, Kentucky, from 1933 until September 1938, when he sold out to Rockwood Amusements, Inc., which had operated [fol. 3172] an opposition theatre to him at that point since 1937. He was consistently able to contract for the product of Universal Film Exchanges, Inc., during the entire period of his operations at Greenville.

161. There is no proof of any dealings between Universal Film Exchanges, Inc., and Anderson, or Crescent Amusement Company, for the period during which Anderson was in competition with the Crescent Amusement Company at Hopkinsville, Kentucky.

162. Universal Film Exchanges, Inc. sold to Buchanan its 1937-38 and 1938-39 product for Athens. Buchanan had considerable difficulty in playing off this contract as and when pictures became available, applied for and received substantial price concessions, and at the time he sold out to Muscle Shoals he was delinquent in his contract and owed Universal Film Exchanges, Inc., substantial sums under his contract. He paid for such pictures as he had played under the contract, but refused and failed to make any payment for the amounts due upon the unliquidated portion of the contract.

163. In conducting its negotiations and making its contracts for the licensing of films in the territory covered by the complaint, Universal Film Exchanges, Inc., conducted all its negotiations and made all its contracts, whether with independents or defendant exhibitors, without any intent, purpose or effect to bring about a monopoly in the exhibition of motion pictures in that territory, or unduly restrain interstate commerce, but with the sole purpose and intent of receiving the maximum amount of revenue legitimately possible.

I — United Artists:

164. The selling season for each year commences after the respective convention of United Artists Corporation, usually held during the month of July, during which period the salesmen out of the various branch offices attempt to sell the maximum number of *of* exhibitors in their respec- [fol. 3173] tive territories.

United Artists Corporation sells pictures released by it in producer blocks, selling one or more of the pictures released by its respective producer clients in one separate contract with the exhibitor, or exhibitors, purchasing such picture or pictures. There is no regularity of release with respect to features sold by United Artists Corporation. A picture sold as part of one season's releases may not be released until one or two seasons later, or may never be released.

165. United Artists Corporation has made the following contracts with the defendant exhibitors and their affiliates for the season 1934-35 to 1936-37, inclusive:

Crescent Amusement Company, dated February 1936; six pictures, 1934-35 season	$4,250.00
Crescent Amusement Co., dated April 4, 1935, three pictures	$3,500.00
Crescent Amusement Co., dated June 3, 1935, six pictures, 1934-35	$4,500.00
One picture, 1935-36	1,500.00
	$13,750.00
Crescent Amusement Co. contract dated March 20, 1936, four pictures 1935-36 season	$4,750.00
Crescent Amusement Co. contract, undated four pictures, 1935-36 season	$3,350.00
	$8,100.00

The contracts for the 1934-35 and 1935-36 seasons are blanket contracts covering eighteen towns operated by Crescent Amusement Company, except for the two contracts for four pictures each of the 1935-36 season three more Crescent towns were added.

Crescent Amusement Co. contract dated Septem-
[fol. 3174] ber 2, 1936, ten pictures 1936-37
season, and two pictures, 1937-38 season $7,353.00
Crescent Amusement Co. contract dated Decem-
ber 2nd, 1936, ten pictures, 1936-37 season, and
two pictures, 1937-38 season 1,008.00

The contract of September 2nd, 1936, covers twenty-one Crescent towns and six sub-runs in the City of Nashville.

Contract of December 2nd, 1936 covers eight Rockwood towns and one Hartselle town.

Rockwood Amusements contract dated May 4, 1937, five pictures, 1936-37; one picture 1937-38 season and four pictures 1938-39 season, $3,816.00. The towns covered by this contract are the same as those covered by the contract of December 2nd, 1936, with the addition of five Cherokee towns.

Crescent Amusement Company contract dated May 4, 1937 five pictures, 1936-37 season, one picture 1937-38 season, and four pictures, 1938-39 season, total $3,856.00.

The towns covered by this contract are the same as those covered in the contract of September 2nd, 1936, except that Lewisburg, owned by Lewisburg Theatres, Inc., is substituted for Kingsport, and Elizabethtown, Kentucky, owned by Kentucky Amusements Inc., and Russellville, Alabama, owned by Hartselle Theatres, Inc., are added.

In each of these contracts the price per picture is fixed at a lump sum for all of the situations covered by the contract with no allocation as to the respective individual situations. There is no allocation as to price between the several separate corporations whose towns are included in the same contract. The total of the foregoing contracts is $16,033.00.

During the 1937-38 season United Artists Corporation negotiated with the defendant exhibitors and their affiliates [fol. 3175] for the licensing of their products for their products for that season but were unable to make a contract.

Such United Artists pictures as were played by the defendant exhibitors and their affiliates in the 1937-38 season were hold-overs on prior contracts hereinabove mentioned.

Again in the summer of 1938 United Artists Corporation initiated negotiations with the defendant exhibitors and their affiliates for sale of the 1938-39 product, which negotiations extended over a period of seven or eight months, during which time United Artists made contracts wherever possible with various independents operating in competition with the defendant exhibitors. Finally, on April 8th, 1939, United Artists Corporation was able to make a contract with the Crescent Amusement Company and its affiliates for certain pictures of the 1938-39 product. The contract was signed by Tony Sudekum and included first-run exhibitions in eighteen Crescent Amusement Company towns and nine sub-runs in the City of Nashville, a total of twenty-seven Crescent situations; first run in six Cherokee towns, five Ruffin towns, ten Rockwood towns, four Chickasaw towns, one Dickson town, two Hartselle towns, one Kentucky Amusements town, one Lewisburg town, three Midstate towns, one Lawrenceburg town, and one Newport town, a total of sixty-one situations.

The contract provided for the exhibition of ten pictures for the 1938-39 season and two pictures for the 1939-40 season, for a total amount of $14,800.00. Separate price was made for each picture listed in the contract but there was no allocation as between the various corporations covered by the contract, nor was the price broken down into specific amounts for each town. It provided, among other things, that the entire rental for each picture was to be paid with the first shipment of the picture.

166. On November 22nd, 1940, the United Artists Corporation made a contract with the defendant Tony Sudekum, and Kermit C. Stengel, for the exhibition of fourteen pic- [fol. 3176] tures for the 1939-40 season for a total of $20,750.00. This contract covered first-run in twenty-one Crescent Amusement Company towns and ten sub-runs in the City of Nashville, a total of thirty-one situations, and first-run in nine Cherokee towns, five Ruffin towns, twelve Rockwood towns, five Chickasaw towns, one Dickson town, two Hartselle towns, one Kentucky town, two Midstate towns, one Lawrenceburg town, two Newport towns, and one Lyric town, a total of seventy-three situations.

As to the situations covered, the only difference between the seventy-three situation contract and the sixty-one situation contract was the additional towns of Crescent and affiliated exhibitors, and also the addition of some towns of affiliated exhibitors not covered by the sixty-one situation deal.

As in the sixty-one situation deal, a blanket price was made for each picture in the seventy-three situations, but there was no allocation as to price as between the affiliated corporations, nor was the price for each picture broken down as between the individual situations.

This contract, among other things, provided that the entire rental for each picture was to be paid prior to its first shipment.

The above two latter contracts were in no respect different from the prior United Artists contracts above mentioned except in an increased number of affiliated corporations and towns covered. These were all the contracts made by United Artists with defendant exhibitors or their affiliates for the period covered by this law-suit except with Muscle Shoals Theatres, which always made and negotiated its own contracts, and contracts with Rogersville Theatre, Rogersville, Tennessee, and Cumberland Amusement Company, hereinafter mentioned.

167. In the negotiation and execution of the two foregoing contracts United Artists pursued its usual, ordinary and customary practice in contracting for the exhibition of motion pictures with exhibitors and affiliated exhibitors operating groups of theatres.

168. In the negotiations and execution of the two fore- [fol. 3177] going contracts United Artists Corporation pursued the usual and customary policy which they had found through long experience to be particularly desirable and advantageous to it in the operation of its business; in that, first, it received payment in full at or before the first exhibition of each picture, thus furnishing stability of financing for its producer clients; and second, in that it insured the liquidation of the contracts.

169. The conditions under which United Artists conducts its distribution business is substantially different from other distributors in the motion picture industry. It distributes for a limited number of producers under con-

fractual arrangements with them, and has for distribution each year only a limited number of first-class, expensive, feature length pictures commonly referred to in the industry as "A" pictures; whereas other distributors generally distribute two or three times as many feature length pictures, and also shorts and news reels as well.

The business of the United Artists in some respects resembles that of a cooperative venture, the producers exercising certain control and supervision over the distribution of their respective pictures, the prices to be paid by the exhibitors and the days on which they are to be played by exhibitors, and the United Artists retains a percentage of the film rentals as its fee for distribution services. A substantial portion of the pictures distributed by the United Artists are foreign made pictures, which have little or no box office appeal in the majority of theatres in the territory involved in this lawsuit and which a large number of exhibitors in this territory refuse to exhibit. Generally speaking, the pictures distributed by United Artists are costly and expensive pictures but appeal to a sophisticated type of audience commonly and generally found only in large communities. The producers distributing through United Artists produce pictures either with their own capital or upon borrowed capital pledging their own credit secured by the pledge of anticipated film rentals, and the return of their invested capital through their respective share of the [fol. 3178] film rentals procured by United Artists is a matter of prime importance to them.

Because of the fact that United Artists had no exchange in Memphis, Tennessee, the exchanges of the United Artists servicing the territory involved in this lawsuit were at a considerable distance, in many instances from 500 to 800 miles distant from many of the towns involved in this lawsuit.

The blanket contracts made by United Artists Corporation for 61 situations in 1938-39, and for 73 situations in 1939-40 provided the United Artists with full payment for the license to exhibit its pictures in the territory in question, was for the benefit of the producers for whom it was distributing. It eliminated the necessity of incurring expenses connected with the canvassing and solicitation of many small towns and situations where the type of picture distributed by United Artists did not have a great audience appeal, where the exhibitor would not exhibit such pictures

on a percentage basis on Saturdays and Sundays, as the United Artists producers demanded; and where the flat rentals procured might not warrant the time, energy, effort and expense involved in such solicitation.

United Artists in making such blanket deals for a flat rental price with the Crescent and other affiliated theatres was acting in accordance with ordinary sound and reasonable business judgment in the light of the existing conditions in the territory, and not with any purpose or intention to combine, conspire or contract with the defendant exhibitors herein to suppress or restrain interstate commerce; nor with the intent, purpose or effect of bringing about a monopoly in the exhibition of motion pictures in the territory covered by this bill.

170. Such contracts above mentioned did not in fact suppress or restrain interstate commerce, or create or tend to create a monopoly in the exhibition of motion pictures in the territory covered by the bill.

[fol. 3179] 171. United Artists Corporation sold Dozier for exhibition in the Roxy Theatre in Earlington their product for the years 1937-38 and 1938-39.

It sold thirteen of its 1936-37 product and two hold-over pictures from the 1937-38 product to Rockwood Amusement Company for exhibition in the Earl Theatre at Earlington but did not sell any of its 1937-38 or 1938-39 product for exhibition in that theatre.

The Crescent Amusement Company at Madisonville, Kentucky, had been a customer of United Artists for a portion of its product for the years 1934-35, and 1936-37 but had purchased no United Artists product for 1937-38, and was one of the Crescent towns covered by the sixty-one situation deal executed on April 8th, 1939, for the 1938-39 product.

Except for a misunderstanding which arose over the booking of the picture "Stage Coach" in June 1939, which was later settled amicably between Dozier and the branch manager of United Artists at Indianapolis, Dozier makes no complaint as to the treatment received by him from United Artists Corporation, and there is no evidence of any discrimination by the United Artists Corporation against Dozier and in favor of Crescent Amusement Company or Rockwood Amusements, Inc.

172. Lawing contracted for the 1934-35 United Artists product at Brownsville but did not play any of the pictures because he considered the price too high and the express on the film from St. Louis likewise too high.

There is no evidence that he ever liquidated this obligation. He made no effort to procure the 1935-36 product either at Paris or Brownsville.

173. There is no evidence of any discrimination by United Artists Corporation in the licensing of its pictures at Greenville, Maryville, and LaFollette, as between the Crescent Amusement Company and the independent exhibitors Parrott & Hendron Amusement Company and Ausmus and Parrott Amusement Company.

[fol. 3180] 174. United Artists Corporation sold none of its product to Crescent Amusement Company or Newport Amusement Company, Inc., either at Morristown, Harriman or Newport, during any of the period in which Peerless was in competition with Crescent Amusement Company or Newport Amusement in those towns. On the other hand, it made all of its product available to Peerless Enterprises, Inc., and made contracts with it for the exhibition of its product in those towns during the entire period of its operation there.

175. There is no evidence in the record as to any discrimination or any dealings on the part of United Artists Corporation with Ray Smith at Murfreesboro, Tennessee.

176. There is no evidence in the record of any dealings between the United Artists Corporation and Ray Smith at McMinnville, Tennessee, and no proof of any discrimination against him by United Artists Corporation.

177. W. F. Roth has continuously purchased United Artists product at Gallatin, since 1936-37, and United Artists Corporation has never sold Crescent Amusement Company at Gallatin.

178. William Griffith Head operated a theatre in Greenville, Kentucky, from 1933 until September 1938, when he sold out to Rockwood Amusements, Inc., which had operated an opposition theatre to him at that point since 1937. He was consistently able to contract for the product of

United Artists Corporation, during the entire period of his operation at Greenville.

179. United Artists Corporation has sold its product to Crescent Amusement Company at Hopkinsville, Kentucky, until the 1937-38 season. In January or February 1938 it sold its 1937-38 product to Andy Anderson at this point.

180. John D. Henry, operating a theatre at Union City, Tennessee, made an application for United Artists Corporation product at Union City on October 13, 1938, for twenty-seven pictures, 1938-39 product, and ten pictures, 1937-38 product. At the time he made his application and several times subsequent thereto Henry detailed his plans [fol. 3181] for opening opposition theatres to the Crescent Amusement Company, not only at Union City, but at several other West Tennessee towns.

As soon as Henry obtained his lease on January 3rd, 1939, he advised United Artists at Atlanta to this effect, and his applications were accepted and approved by United Artists. At the same time United Artists Corporation expressed a willingness to contract with Henry at such other opposition points as he should be able to open theatres, and made every effort to cooperate with him in his opposition to Crescent Amusement Company.

He played only a small part of his contract with United Artists Corporation at Union City, and at the time of his sale to the Crescent Amusement Company owed United Artists about one thousand dollars for unplayed pictures, none of which he ever paid.

J. — Strand Enterprises, Inc.:

181. G. W. Haynes in 1933 entered the motion picture business and operated a small theatre in Tiptonville, Tennessee, and later opened a few more theatres in small towns in that vicinity. In 1934, he entered Union City, Tennessee, and converted a store into a theatre which had about three hundred seats. This theatre was known as a Class "B" theatre and exhibited mainly action and western pictures at admission prices of 10¢ for children and 15¢ or two for 25¢ for adults.

182. Defendant, Crescent Amusement Company was operating a theatre in Union City when Mr. Haynes entered. Haynes does not recall whether or not it was a Mr.

Cox, who was manager of the Crescent Theatre at Union City, or some friend, who suggested to him the possibility of forming a connection with defendant Sudekum, or the Crescent Amusement Company. In any event, negotiations were held and Strand Enterprises, Inc., was incorporated in 1935, the capital stock being $25,000.00, one-half of which was issued to Haynes and the other half to Crescent. Haynes [fol. 3182] testified that he was desirous of forming a connection with Crescent because he was planning to expand and needed additional capital. In fact, that was the main reason for his desire to become connected with Crescent.

183. Crescent paid $12,500.00 for its half interest in Strand Enterprises, Inc., and Mr. Haynes put into the corporation his theatres at Tiptonville, Tennessee, Ridgely, Tennessee, Earl, Arkansas, and West Memphis, Arkansas. The theatre at Union City was closed and the equipment moved to Fulton, Kentucky, where the company operated a theatre.

184. The Company has opposition at Lexington, Philadelphia, and Durant, Mississippi, and Lepanto, Arkansas. The company has always had opposition in Lexington, Mississippi since the opening of its theatres there in 1937. The opposition at Philadelphia commenced in January 1941, and the opposition at Durant, Mississippi, is just beginning. An opposition house at Lepanto opened in June 1941. Strand Enterprises, Inc., is preparing to open a second theatre at Durant.

185. Haynes did his own purchasing of pictures for the Strand circuit and never had any advice or assistance from Sudekum, Stengel or any of the officials of the other defendant exhibitors. He had no franchises for films and Strand never had any clearance clauses in any of its contracts. Whenever Strand purchased an opposition theatre, in no case did it require the opposition to agree that it would not enter the motion picture business. In fact, the evidence shows that one or two of them have come back after Haynes purchased from them and have opened up an opposition theatre. A particular instance is that at Durant, Mississippi. Strand purchased from Odom Brothers and after making the purchase from the thereafter Odom Brothers reentered Durant and opened up an opposition theatre.

[fol. 3183] 186. Also, Strand Enterprises bought films from producers at times when Crescent was not buying films from those same producers. Ever since Haynes has been in business he purchased pictures from Paramount until the 1939-40 season, when he left them out. Then he left out Fox and Warner in 1939-40. Crescent was purchasing product from both of those producers for those seasons.

187. Strand Enterprises, Inc., has not received any privileges from any distributor or producer whereby competition has been eliminated, and it has not entered into any conspiracy with any of the other defendants to in any respect suppress competition. It has not compelled any distributor or producer to grant it any exclusive privilege, and no proof has been introduced that Strand Enterprises, Inc., has in any way prevented any opposition theatre from obtaining enough first class pictures for exhibition to operate its theatres. There is no evidence that Strand Enterprises, Inc., is guilty of the matters and things alleged by the plaintiff in the complaint.

[fol. 3184] CONCLUSIONS:

1. The Court has jurisdiction of this cause under the provisions of the Act of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraint and Monopolies", hereinafter referred to as The Sherman Act.

2. While the operation of a motion picture theatre for the exhibition of motion pictures at a fixed situs, in itself, is ordinarily considered a "local" matter and of an intrastate character, yet the making of licensing agreements between distributors of motion pictures and exhibitors and the interstate shipment of films pursuant thereto, is clearly a part of interstate commerce. The distribution of film through the branch offices of the distributors by which pictures are made available for use by the exhibitors and without which they could not carry on their "local" business, necessarily contributes to the whole.

The processes upon which exhibitors have to rely in obtaining films for exhibition, or to which distributors have to resort in undertaking to supply film for exhibition, manifestly constitutes interstate commerce. Hence it is sufficient for the purpose of testing the applicability of the

Sherman Act, if a conspiracy or combination though directed primarily against local trade, contemplates as a means for its accomplishment, interference with or unreasonable restraint of, interstate commerce by the elimination of competitive freedom of the market for the purchase of film; the monopolization of first run films, not needed and not exhibited, in order to keep competitors from exhibiting same; the elimination of competition by tying up pictures, not reasonably required in ordinary course of business, by long term contracts or franchises, and by depriving the public of seeing pictures which otherwise might have been exhibited and moved in interstate commerce.

Further, predatory practices employed in the elimination of competition although local in nature, when viewed as part of the conspiracy or combination to so interfere with interstate commerce, necessarily becomes a component part of the whole.

[fol. 3185] Especially are these principles applicable to a situation where an exhibitor has built up a large chain of theatres, operating in several different states, under circumstances where the business itself assumes an interstate character.

3. The combination or conspiracy alleged in the complaint as to Columbia Pictures Corporation has not been established. Defendant Columbia at no time during the period in question combined with any or all of the defendant exhibitors unreasonably to restrain interstate trade or commerce in motion picture films and to monopolize and to attempt to monopolize the exhibition of motion pictures in the Crescent towns and in other towns in the States of Tennessee, Alabama, Kentucky, Arkansas, Mississippi, or North Carolina, in violation of Sections 1 and 2 of the Sherman Act, and that defendant Columbia during the period in question at no time violated Sections 1 and 2 of the Sherman Act. A decree should be entered herein dismissing the complaint against Columbia upon the merits.

4. The combination or conspiracy alleged in the complaint as to Universal Pictures Company, Inc., has not been established. This defendant did not at any time during the period involved in this case, combine with the defendant exhibitors or any of their affiliates, unreasonably to restrain interstate trade or commerce in motion picture films, or to monopolize or attempt to monopolize the ex-

hibition of motion pictures in the towns mentioned in the complaint. A decree should be entered herein dismissing the complaint against Universal Pictures Company, Inc.

5. The combination or conspiracy alleged in the complaint as to Universal Film Exchanges, Inc., has not been established. This defendant did not at any time during the period involved in this case combine with the defendant exhibitors or any of their affiliates unreasonably to restrain interstate trade or commerce in motion pictures in the towns mentioned in the complaint.

[fol. 3186] 6. The Universal Film Exchanges, Inc., has not been dominated, controlled, coerced or influenced by the defendant exhibitors or their affiliates, to withhold its feature pictures from exhibitors in the towns mentioned in the complaint, but on the contrary, has made its feature pictures available to exhibitors in each exchange territory upon a basis consistent with sound business judgment and compatible with obtaining the greatest amount of revenue possible, and in the usual and ordinary course of business. None of the contracts entered into by Universal Film Exchanges, Inc., with any of the exhibitors with whom it contracted, are unreasonable restraint of interstate commerce, nor do they have the effect, or tend to have the effect, of bringing about a monopoly in the exhibition of motion pictures in the territory covered by the complaint. A decree should be entered herein dismissing the complaint against the Universal Film Exchanges, Inc.

7. The combination or conspiracy alleged in the complaint as to Strand Enterprises, Inc., has not been established. This defendant did not at any time during the period involved in this case, combine with the other defendant exhibitors, or any of their affiliates, or any of the defendant distributors or co-conspirators, unreasonably to restrain interstate trade or commerce in motion picture films, or to monopolize, or attempt to monopolize, the exhibition of motion pictures in the towns mentioned in the complaint. A decree should be entered herein dismissing the complaint against Strand Enterprises, Inc.

8. The combination or conspiracy alleged in the complaint as to the defendant R. E. Baulch has not been established. There is no evidence that the defendant Baulch

actively participated in any of the violations of the Sherman Act in combining or conspiring with any of the other defendants, and is regarded by the Court as being only a nominal party to the proceedings on account of the official position held by him, as Secretary and Treasurer of some [fol. 3187] of the defendant exhibitors.

9. Each of the defendants, Crescent Amusement Company, Inc., Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company and Cherokee Amusements, Inc., has violated the Sherman Act in the following manner:

A. Creating and maintaining an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, and Central and Western Kentucky, in which each has theatres.

B. Combining its closed towns with its competitive situations in licensing films for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate against its independent competitors in licensing films.

C. Coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practices.

10. The defendants, Crescent, Muscle Shoals, Rockwood, Cherokee, Lyric and Kentucky, have violated the Sherman Act by combining with each other and with each of the distributors Paramount, Fox and Warner, in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them.

The franchises entered into between the co-conspirators, Paramount, Fox and Warner, and the defendant exhibitors are contracts in restraint of trade or commerce among the several states, tending to perpetuate the monopolies of the defendant exhibitors involved, foreclosing competition by independent exhibitors, with the defendant exhibitors in the licensing of film over large areas and for long periods of time.

[fol. 3188] 11. The defendant exhibitors, Crescent, Muscle Shoals, Rockwood, Cumberland and Cherokee, have col-

lectively violated the Sherman Act by combining with each other for the purpose of dividing the territory in which theatres may be operated by any of them pursuant to implied agreements among themselves.

12. The said defendant exhibitors have violated the Sherman Act by combining with each other for the purpose and with the effect of eliminating, suppressing and preventing independent competition in the territory in which each operates.

13. The said defendant exhibitors have violated the Sherman Act by combining with each other, and with the major distributors, Paramount, Fox, Warner, Loew's, RKO, and United Artists, in licensing films for the purpose and with the effect of maintaining their theatre monopolies and preventing independent theatres from competing with them.

14. The defendant Anthony Sudekum, has violated the Sherman Act by actively participating in the foregoing violations as president of Crescent, Cumberland and Lyric.

15. The defendant, Kermit C. Stengel, has violated the Sherman Act by actively participating in the foregoing violations as an assistant to the defendant Sudekum, in managing Crescent, as president of Rockwood, vice-president of Cherokee, and vice-president of Kentucky.

16. The defendant Louis Rosenbaum, has violated the Sherman Act by actively participating in the foregoing violations as manager and active partner of Muscle Shoals Theatres.

17. The defendant United Artists Corporation, has violated the Sherman Act by the following acts:

A. Combining with Cumberland, Rockwood and Stengel to eliminate its independent theatre competition at Rogersville, Tennessee.

B. Combining with Rosenbaum, Sudekum, Rockwood. [fol. 3189] and Stengel to eliminate independent theatre competition of Muscle Shoals, at Athens, Alabama.

This phase of the case has caused the Court more concern than any other question involved. The Court recognizes the rule that a distributor of motion picture film is

perfectly free to do business with the exhibitor of its choice, and to negotiate with a circuit and an independent one, at one and the same time, and to sell either one it prefers to do business with, yet such conduct must be free from discrimination against independent enterprise as a result of pressure or coercion on the part of a monopoly or combination.

There is no evidence that United Artists entered into a conspiracy with either Crescent, Rockwood, Cumberland, Sudekum, Stengel or Rosenbaum, in any of these matters, yet to hold there was no discrimination in either of the above instances, would be ignoring the plain facts. Under all the circumstances, United Artists could hardly be blamed for preferring to do business with the circuit and its affiliates, but it should not have allowed such desire to influence its conduct to the extent it apparently did, in its dealings with Miller and Buchanan. The principal criticism for this situation, however, lies at the doorst p of the monopoly built up by Crescent and its affiliates, and United Artists hardly did more than cooperate with what it knew to be the policy of the monopoly in order to make an attractive business deal.

18. The blanket contracts made by United Artists Corporation, for sixty-one situations in 1938-39, and for seventy-three situations in 1939-40, reflected the usual method adopted by this defendant in licensing its films to exhibitors, and as far as the contract itself is concerned, the Court can see no difference in the method adopted by this defendant and the usual method followed by other distributors in making separate contracts with each exhibitor for a given number of films, nor is there anything more objectionable [fol. 3190] from the standpoint of inhibitions under the Sherman Act, in the choice of the defendant licensing its film in this manner, rather than following the usual procedure adopted by other distributors. The Court therefore concludes that the contract in itself, is not a contract in restraint of trade or commerce, in violation of any of the provisions of the Sherman Act; nor was the contract in this case executed with any purpose or intention to combine, conspire, or contract with the defendant exhibitors to suppress or restrain interstate commerce, nor with the intent, or purpose, of bringing about a monopoly in the

exhibition of motion pictures in the territory involved in this cause.

19. The plaintiff is entitled to an injunction restraining the defendants indicated herein from continuing in said conspiracies in restraint of trade and commerce, and from entering into any similar combinations and conspiracies having similar purposes and objects.

20. The plaintiff is entitled to an injunction invalidating the existing franchises to which the exhibitor defendants are parties; invalidating existing agreements not to compete in the future to which the exhibitor defendants are parties; restraining each exhibitor defendant from conditioning the licensing of films in any competitive situation, outside Nashville, upon the licensing of films in any other theatre situation; and restraining each exhibitor defendant from acquiring a financial interest in additional theatres outside Nashville, except after an affirmative showing that such acquisition will not unreasonably restrain competition.

21. The plaintiff is entitled to a decree dissolving the combination; requiring each corporate exhibitor defendant to divest itself of the ownership of any stock or other interest in any corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc., and requir- [fols. 3191-3208] ing the individual defendants found guilty herein of violating the Sherman Act, to resign as officers of any affiliated corporation, and requiring the defendant Rosenbaum to terminate and dissolve the partnership of Muscle Shoals Theatres, and requiring him to divest himself of any interest which he may have in any of the corporate defendants, which said acts of dissolution shall be performed within one year from date of entry of judgment in this cause. Judgment will be entered accordingly.

This the 3rd day of March, 1943.

Elmer D. Davies, United States District Judge.

Attest: A True Copy.

L. B. Ormes, Clerk, U. S. District Court, Middle District of Tennessee, By L. E. Wasson, Chief Deputy Clerk. (Seal.)

[fol. 3209] IN THE DISTRICT COURT OF THE UNITED STATES, MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Civil Action 54

UNITED STATES OF AMERICA, Plaintiff,

vs.

CRESCENT AMUSEMENT COMPANY, INCORPORATED, et al., Defendant

FINAL DECREE—Filed May 17, 1943

This cause having come on for hearing before this Court upon the pleadings and upon the testimony, both oral and documentary, introduced at the trial of this cause, and the same having been argued by counsel both orally and upon briefs submitted, and the Court having made and filed its findings of fact and conclusions of law herein on the 3rd day of March, 1943:

It is hereby ordered, adjudged and decreed as follows:

(1) That the defendants, The Crescent Amusement Company, a corporation, Muscle Shoals Theatres, a partnership, Rockwood Amusements, Inc., Cherokee Amusements, Inc., Lyric Amusement Company, Inc., and Kentucky Amusement Company, Inc., be, and they hereby are, enjoined and restrained from continuing in combination wit' each other and with each of the distributors, Paramount, Fox and Warner, in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

[fol. 3210] (2) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel, and Louis Rosenbaum, be, and they hereby are, enjoined and restrained from continuing in combination with each other for the purpose of dividing the territory in which theatres may be operated by any of them pursuant to implied agreements among themselves; and are further en-

joined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(3) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel, and Louis Rosenbaum be, and they are hereby enjoined and restrained from continuing in combination with each other for the purpose and with the effect of eliminating, suppressing and preventing independent competition in the territory in which each operates; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(4) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel and Louis Rosenbaum be, and they hereby are, enjoined and restrained from continuing in combination with each other, and with Paramount, Fox, Warner, Loew's, RKO, and United Artists in licensing films for the purpose and with the effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar combinations and conspiracies having [fol. 3211] similar purposes and objects.

(5) That the defendant United Artists Corporation, be, and it hereby is, enjoined and restrained from continuing in combination with Cumberland, Rockwood, and Stengel to eliminate its independent theatre competition at Rogersville, Tennessee; and is further enjoined and restrained from entering into any similar combinations having similar purposes and objects.

(6) That the defendant United Artists Corporation be, and it hereby is, enjoined and restrained from continuing in combination with Rosenbaum, Sudekum, Rockwood and Stengel to eliminate independent theatre competition of Muscle Shoals at Athens, Alabama; and is further enjoined and restrained from entering into any similar combinations having similar purposes and objects.

(7) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be, and it hereby is, enjoined and restrained from creating or maintaining an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, and Central and Western Kentucky, in which each has theatres.

(8) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be, and it hereby is, enjoined and restrained from combining its closed towns with its competitive situations, in licensing films for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate against its independent competitors in licensing films.

[fol. 3212] (9) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., its officers, agents or servants, be and it hereby is enjoined and restrained from coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practices.

(10) That all existing franchises to which the Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, Cherokee Amusements, Inc., Lyric Amusement Company, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, Kermit C. Stengel, or Louis Rosenbaum, hereinafter referred to as the exhibitor defendants, is a party, be, and they hereby are, declared invalid, except insofar as any such franchise may relate to theatres operated by any of said defendants in Nashville, Tennessee, the validity of which the Court does not expressly adjudicate in this cause.

(11) That all existing agreements not to compete in the future to which any exhibitor defendant is a party, be, and they hereby are, declared invalid.

(12) That each exhibitor defendant be, and hereby is, enjoined and restrained from conditioning the licensing of

films in any competitive situation outside Nashville, Tennessee, upon the licensing of films in any other theatre situation.

(13) That each of the corporate exhibitor defendants, be, and it hereby is, required to divest itself of the ownership of any stock or other interest in any other corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc., and each such defendant is hereby enjoined and restrained from acquiring the ownership of any stock or other interest in any other corporate defend- [fol. 3213] ant, or affiliated corporation, with the exception of Strand Enterprises, Inc.

(14) That the defendant, Louis Rosenbaum, be, and he hereby is, required to divest himself of any interest which he may have in any of the corporate defendants, and said defendant Rosenbaum is hereby enjoined and restrained from acquiring any interest in said corporate defendants.

(15) That the defendant, Anthony Sudekum, be and he hereby is, required to resign as an officer of any corporation except the Crescent Amusement Company, which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, except the Crescent Amusement Company, by acting as an officer thereof, or otherwise,

(16) That the defendant, Kermit C. Stengel, be, and he hereby is, required to resign as an officer of any corporation, except one defendant corporation of his choice, which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, xcept the corporation of his choice, by acting as an officer thereof, or otherwise.

(17) Wherever reference is made in this decree to affiliated corporations such reference shall not include the following corporations: Bijou-Louisiana Corporation, Shreveport Theatre Corporation, Bijou-Pensacola Corporation, Bijou-Ft. Worth Corporation, Ace Theatre Corporation, Lincoln Amusement Company, Lewisburg Theatre Company, The Auditorium Company, Hippodrome Attractions, Stock Yards, Ricks Hosiery Mills, Springfield Woolen Mills, Mid-State, Chickasaw, Dickson and Nu-Strand Corporation.

[fols. 3214-3238] (18) That the acts of dissolution described in paragraphs (13), (14), (15), and (16) hereof, shall be performed within one year from date of entry of this decree.

(19) That the exhibitor defendants, and each of them be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres, outside Nashville, Tennessee, in any town where there is already located a theatre, whether in operation or not, unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents or servants are guilty of any of the acts or practices prohibited by paragraph nine (9) hereof.

(20) That the jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and decrees as may be necessary or appropriate for the construction or carrying out of this decree, for modification or termination of any of the provisions thereof, for the enforcement or compliance therewith and for the punishment of violations thereof.

(21) That the costs of this action shall be taxed against the exhibitor defendants.

(22) That the Bill of Complaint be, and it hereby is, dismissed as to the defendants, Strand Enterprises, Inc., Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Columbia Pictures Corporation, and R. E. Baulch, upon the merits.

Enter May 17, 1943.

Elmer D. Davies (Signed) United States District Judge.

[fol. 3239] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTIONS OF DEFENDANTS, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., ROCKWOOD AMUSEMENTS, INC., CHEROKEE AMUSEMENTS, INC., KENTUCKY AMUSEMENT CO., INC., ANTHONY SUDEKUM AND KERMIT C. STENGEL, TO AMEND FINDINGS AND FOR ADDITIONAL FINDINGS—Filed May 27, 1943

Each of the above named dependants adopts and relies upon petitions heretofore filed in which modifications or amendments are sought as to the Findings filed March 3, 1943, viz., petition of Cumberland Amusement Company filed on March 20, 1943; petition of Rockwood Amusements, Inc., Chefokee Amusements, Inc. and Kentucky Amusement Co., Inc., filed on March 23, 1943; and supplemental petition of Rockwood Amusements, Inc., Cherokee Amusements, Inc., and Kentucky Amusement Co., Inc., filed on March 26, 1943; and each of the above named defendants, to the extent that they or any of them may be affected by Findings more specifically relating to any co-defendant, also adopts and relies upon the petitions or motions of said co-defendants, including the motion of The Crescent Amusement Company filed simultaneously herewith. Each of said defendants further moves the Court to amend the conclusions of law and decree consistently with the amendments [fol. 3240] to findings and additional findings sought in said petitions and motions.

William Waller, Geo. H. Armistead, Jr., D. L. Lansden. Address: American Trust Building, Nashville, Tennessee, Counsel for Defendants.

[fols. 3240a-3240b] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

DESIGNATION BY APPELLEES, THE CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., ROCKWOOD AMUSEMENTS, INC., CHEROKEE AMUSEMENTS, INC., KENTUCKY AMUSEMENT COMPANY, INC., ANTHONY SUDEKUM, AND KERMIT C. STENGEL, OF ADDITIONAL PORTIONS OF THE RECORD—Filed July 23, 1943

Appellees, The Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, and Kermit C. Stengel, designate the following matters to be included in the record on appeal, in addition to the matters designated by the appellant:

1. Motion of defendant, The Crescent Amusement Company, to amend findings and make additional findings, which was filed on May 27, 1943.

2. Motions of defendants, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, and Kermit C. Stengel, to amend findings and for additional findings, filed in this Court on May 27, 1943.

3. Petition of Cumberland Amusement Company filed on March 23rd, 1943.

[fol. 3240c] 4. Petition of Rockwood Amusements, Inc., Cherokee Amusements, Inc., and Kentucky Amusement Company, Inc., filed on March 23, 1943.

5. Supplemental petition of Rockwood Amusements, Inc., filed on March 31, 1943.

6. Motion of The Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum and Kermit C. Stengel, filed on July 23, 1943 to dismiss the appeal of the plaintiff.

7. Order entered April 20, 1943.

8. Certificate of the Clerk of this Court that the motion of The Crescent Amusement Company filed on May 27, 1943, and the motions of Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum and Kermit C. Stengel, filed on May 27, 1943, are still pending and undisposed of at the time of the filing of this Designation, and that the petition of Cumberland Amusement Company, filed on March 23, 1943, and the Petition of Rockwood Amusements, Inc., Cherokee Amusements, Inc., and Kentucky Amusement Company, Inc., filed on March 23, 1943, and the supplemental petition of Rockwood Amusements, Inc., Cherokee Amusements, Inc., and Kentucky Amusement Company, Inc., filed on March 3, 1943, are still pending and have not been disposed of at the time of the filing of this Designation.

9. This Designation.

Geo. H. Armistead, Jr., William Waller, Attorneys for Appellees. Address: American Trust Building, Nashville, Tennessee.

Armistead, Waller, Davis & Lansden, of Counsel. Address: American Trust Building, Nashville, Tennessee.

[fol. 3240d] IN THE DISTRICT COURT OF THE UNITED STATES

CERTIFICATE OF CLERK

I, L. B. Ormes, Clerk of the District Court of the United States for the Middle District of Tennessee, Nashville Division, hereby certify that there are now pending in this Court and undisposed of by the Court petition of Cumberland Amusement Company, a defendant in this case, filed on March 23, 1943; petition of Rockwood Amusements, Inc., Cherokee Amusements, Inc., and Kentucky Amusement Company, Inc., defendants in this case, filed on March 23, 1943; and a supplemental petition of Rockwood Amusements, Inc., Cherokee Amusements, Inc., and Kentucky Amusement Company, Inc., defendants in this case, filed on March 31, 1943.

Also there are on file in this Court and undisposed of a motion of defendant, The Crescent Amusement Company, to amend findings and make additional findings, which motion was filed on May 27, 1943; and motions of defendants, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, and Kermit C. Stengel, to amend findings and for additional findings, which motion was filed on May 27, 1943.

Witness My hand and the seal of this Court at Nashville, Tennessee on this the 23rd day of July, 1943.

(Signed) L. B. Ormes, Clerk. (Seal.)

[fol. 3240e] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ADDITIONAL DESIGNATION BY APPELLEES, THE CRESCENT AMUSEMENT COMPANY, ET AL., OF CERTAIN PORTIONS OF THE RECORD TO BE INCLUDED IN THE RECORD ON APPEAL—Filed August 13, 1943

The Appellees, The Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum and Kermit C. Stengel, in addition to the designation filed with the Clerk of this Court on July 23, 1943, designating certain matters to be included in the record on appeal, designate the following:

1. Statement of said Appellees as to jurisdiction filed with the Clerk on July 23, 1943.

2. This additional designation.

——— ———, William Waller, Attorneys for Appellees.
Address: American Trust Bldg., Nashville, Tenn.

Of Counsel: Armistead, Waller, Davis & Lansden, Address: American Trust Bldg., Nashville, Tenn.

[fol. 3241] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED FINDINGS AND CONCLUSIONS—Filed August 30, 1943

After consideration of petitions filed in this cause by Rockwood Amusement Company, Cherokee Amusements Company, Kentucky Amusement Company, Cumberland Amusement Company, Muscle Shoals Theatres, Crescent Amusement Company, Louis Rosenbaum, and United Artists Corporations, for modification and amendment of the Findings and Conclusions filed herein on March 3, 1943, the Court hereby makes and files these amended Findings and Conclusions as follows:

AMENDED FINDINGS

19. Amend Finding No. 19 by striking from the second paragraph the words "Chicasaw Amusement Company," and "Dixon Theatres Incorporated," and adding to said paragraph the following sentence: "The defendant, Stengel, on this day owned a one-half interest in the Chicasaw Amusement Company and Dixon Theatres Incorporated," so that said paragraph, as amended reads as follows:

[3242] "On the same date, (August 11, 1939) Rockwood owned a half interest in the following theatre operating corporations, in each of which Stengel was an officer: Cherokee Amusements Company, Ruffin Amusements Incorporated, Kentucky Amusement Company, Lawrenceburg Theatres Incorporated, and Mid-State Theatres Incorporated. The defendant, Stengel, on this date, owned a one-half interest in the Chicasaw Amusement Company and Dixon Theatres, Incorporated."

57. Amend finding No. 57 by adding to the fifth sentence of said finding, the following words: "at prices he was accustomed to pay for such pictures," so that finding No. 57 as amended will read as follows:

"57. In 1937, Potts, the Crescent Manager in Morristown, contacted Miller in Rogersville and told him

that the town was too small for two theatres and advised him to make a deal with Cumberland. He suggested that if Miller wrote him a letter setting forth a proposition, he would forward it to Sudekum. During July or August 1938, Castleberry called on Miller and suggested that he sell his theatre to Rockwood. Miller told him that he was willing to sell. One of the principal reasons for Miller's willingness to sell his theatre was the difficulty he encountered as well as difficulty he anticipated, in securing suitable pictures for exhibition in his theatre, at prices he was accustomed to pay for such pictures. In August 1938, Stengel and Baulch called on Miller, and an agreement for the sale of the Palace Theatre to Rockwood and Miller's employment as manager of the Rogersville Theatre was reached. As soon as Rockwood acquired the Palace Theatre, they closed it, and only one theatre has been operated in Rogersville since that time."

58. Finding No. 58 is amended by striking from the third paragraph thereof the following words: "subject to acceptance by Mr. Sudekum," so that the third paragraph of No. 58 as amended, shall read as follows:

"In March 1939, Moore learned that Stengel had leased a building in McKenzie and immediately went to Nashville to see him. He made a deal with Stengel for $9,200.00 which represented the value of the theatre equipment and lease with nothing for goodwill of the business itself."

[fol. 3243] 61. Amend finding No. 61 by adding as a new paragraph, immediately following paragraph two, the following:

"The record is silent as to whether Taylor's lessee Mr. Gutscholk, had complied with his 1937-1938 contract with Paramount, or whether Taylor himself, after he took the theatre back, assumed Gutscholk's contract with Paramount; and the record is also silent as to whether Taylor ever had any idea of negotiating for the 1938-1939 product. Taylor testified as a witness for plaintiff that one reason he sold out was because he was afraid the film companies would raise the price of pictures with two theatres in town."

102. Amend finding No. 102 by striking out the word "Crescent" wherever it appears in said finding, and inserting in lieu thereof the word "Rockwood"; and by striking from the second sentence of said finding the words "Pursuant to Stengel's instructions", and insert in lieu thereof the words "with Stengel's consent", so that finding No. 102 as amended, shall read as follows:

> "No. 102. Castleberry called on William G. Head on two occasions and asked him if he would be interested in selling his theatre at Greenville, Kentucky. In August 1938, Pittman, Rockwood Manager at Central City, with Stengel's consent, went to Greenville, Kentucky, and ostentatiously measured a lot for the purpose of giving the impression that Rockwood was planning to come into the town. Pittman testified that he did not have to tell anybody in Greenville why he was measuring the lot because 'everybody thought that is what we were going to do; I did not have to say a word, it is a very small town.' In September 1938, Head sold his theatre to Rockwood."

112. Insert immediately after the word "part" and immediately before the word "theatres," appearing in the first sentence of finding No. 112, the following: "except as specifically found herein with respect to Henry's theatre in Union City, and the independent theatre in East Gadsden, Alabama," so that finding No. 112 as amended, will read as follows:

> "No. 112. For the most part, except as specifically found herein with respect to Henry's theatre in Union City, and the independent theatre in East Gadsden, Alabama, theatres operated by independents in com- [fol. 3244] petition with the defendant exhibitors and their affiliates have been greatly inferior to those operated by the defendant exhibitors or their affiliates in the several competitive situations. Usually the theatre building was a converted store building, not built for the purpose of a theatre, unattractive in appearance, and inadequate in modern conveniences. In many instances the equipment has been second hand. Some operations have been inadequately financed, and in a number of cases there was no stability of operation in these independent situations."

"The distributors have found it necessary by reason of this instability of operation and inadequate financing in some instances, to make large concessions from the contract terms originally agreed upon, or to accept cancellations of obligations to exhibit pictures as originally called for under the contract."

113. Amend finding No. 113 by inserting as a new paragraph immediately following paragraph No. two thereof, the following: "Within three or four years preceding the trial, Rockwood and Cherokee experimentally introduced popcorn sales and screen advertising in their theatres. During 1939 popcorn machines were put in every theatre, although popcorn sales were made in only seven out of twelve Rockwood towns during the entire year of 1939. Nevertheless, in 1939, popcorn sales and screen advertising accounted for a large part of Rockwood's net profit (exclusive of dividends) and in several Rockwood and Cherokee towns there would have been a substantial loss, instead of profit, had it not been for popcorn sales and screen advertising. In some small towns, the Saturday business accounted for a substantial part of all receipts and on Saturday it was almost the invariable custom to show a Western picture, which was not produced by any of the distributors alleged in this case to be conspirators. Defendant exhibitors have provided good theatres and good entertainment and have devoted much time and effort in the exploitation of pictures and in giving the public good entertainment in good and comfortable theatres." So that finding No. 113 as amended, will read as follows:

[fol. 3245] "113. During the five-year period immediately preceding the suit, the Crescent and Rockwood companies each experienced a phenomenal growth in earnings and surplus which was out of all proportion to the increase in gross receipts and gross assets resulting from physical expansion of the business and improving general economic conditions. During the five-year fiscal period from June 30, 1934, to June 30, 1939, Crescent's total assets were less than doubled, but its surplus was increased thirty times. During the last fiscal year of said period its gross receipts were less than twice the amount of its gross receipts for the first fiscal year of said period, but its

net profits (exclusive of dividends received) were more than five times those of the first year. During the five-year period, its net earnings, (exclusive of dividends received) averaged about 35 per cent per annum on its capitalization.

During the three calendar years 1937 to 1939, inclusive, (Rockwood was organized in February 1936), Rockwood's total assets approximately tripled, but its surplus increased about eight times. During the calendar year 1939, its gross receipts were somewhat less than three times its gross receipt during the calendar year 1937, but its net earnings (exclusive of dividends received) for 1939 were thirty-one times what they were for 1937. During this three year period, its net earnings per annum (exclusive of dividends received,) averaged twelve times its original capital investment. (Ex. 308) Sudekum and Stengel were also able to profit personally from the absorption of competitors by securing the payment of substantial salaries from the corporations which they formed to take over competing theatres, in addition to their regular compensation from Crescent and Rockwood.

Within three or four years preceding the trial, Rockwood and Cherokee experimentally introduced popcorn sales and screen advertising in their theatres. During 1939 popcorn machines were put in every theatre, although popcorn sales were made in only seven out of twelve Rockwood towns during the entire year of 1939. Nevertheless, in 1939, popcorn sales and screen advertising accounted for a large part of Rockwood's net profit (exclusive of dividends) and in several Rockwood and Cherokee towns there would have been a substantial loss, instead of profit, had it not been for popcorn sales and screen advertising. In some small towns, the Saturday business accounted for a substantial part of all receipts and on Saturday it was almost the invariable custom to show a Western picture, which was not produced by any of the distributors alleged in this case to be conspirators. Defendant exhibitors have provided good theatres and good entertainment and have devoted much time and effort in the exploitation of pictures in giving the public good entertainment in good and comfortable theatres."

20. Amend conclusion No. 20, by striking said conclusion in its entirely, and inserting in lieu thereof, the fellowing:

"20. The plaintiff is entitled to an injunction invalidating the existing franchises to which the exhibitor defendants are parties; invalidating existing agreements not to compete in the future to which the exhibitor defendants are parties; restraining each exhibitor defendant from conditioning the licensing of films in any competitive situation, outside Nashville, upon the licensing of films in any other theatre situation; and restraining each exhibitor defendant from acquiring a financial interest in additional theatres outside Nashville, in any town where there is already located a theatre, whether in operation or not, unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents or servants, are guilty of coercing, or attempting to coerce, any such independent operators into selling out to it, or to abandon plans to compete with it by predatory practices."

21. Amend conclusions No. 21, by striking said conclusion in its entirety, and inserting in lieu thereof the following:

"21. The plaintiff is entitled to a decree dissolving the combination, requiring each corporate exhibitor defendant to divest itself of the ownership of any stock or other interest, in any corporate defendant or affiliated corporation, with the exception of Strand Enterprises, Inc., and requiring the individual defendants found guilty herein of violating the Sherman Act, to resign as officers of any affiliated corporations, and requiring the defendant Rosenbaum to divest himself of any interest which he may have in any of the corporate defendants, and enjoining him from acquiring any interest in said corporate defendants, which said acts of dissolution shall be performed within one year from date of entry of judgment in this cause."

22. Amend by adding as conclusion No. 22, the following:

"22. Wherever reference is made in these conclusions to affiliated corporations, such reference shall

not include the following corporations; Bijou-Louisiana Corporation, Shreveport Theatre Corporation, Bijou-Pensacola Corporation, Bijou-Fort Worth Corporation, Ace Theatre Corporation, Lincoln Amusement Company, Lewisburg Theatre Company, The Auditorium Company, Hippodrome Attractions, Stock [fol. 3247] Yards, Ricks Hosiery Mills, Springfield Woolen Mills, Mid-State, Chickasaw, Dickson, and Nu-Strand Corporation."

23. Amend, by adding as conclusion No. 23, the following:

"23. The costs of this cause shall be taxed against the exhibitor defendants found guilty herein of violating the Sherman Act."

Judgment will be entered accordingly.

All petitions for further reconsideration, modification, and objections to Findings and Conclusions filed herein, except as herein granted, are denied and overruled accordingly.

This the 28th day of August, 1943.

Elmer D. Davis, United States District Judge.

[fol. 3247a] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed July 16, 1943

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final order and decree of this Court entered on the 17th day of May, 1943, does hereby pray an appeal from said final order and decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the assignment of errors and

prayer for reversal accompanying this petition and to which reference is hereby made.

Plaintiff prays that its appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final order and decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Tom C. Clark, Assistant Attorney General; Robert L. Wright, Special Assistant to the Attorney General.

Dated this 16th day of July, 1943.

[fol. 3247b] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed October 27, 1943

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final order and decree of this Court entered on the 17th day of May, 1943, does hereby pray an appeal from said final order and decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

Plaintiff prays that its appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final order and decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Wendell Berge, Assistant Attorney General; Robert L. Wright, Special Assistant to the Attorney General.

Dated this 27 day of October, 1943.

[fol. 3247c] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed July 16, 1943

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the final order and decree of said District Court entered on May 17, 1943, in the above-entitled cause, and says that in the entry of the final order and decree the District Court committed error to the prejudice of the said plaintiff in the following particulars:

1. The Court erred in entering paragraph (19) of the final decree which reads as follows:

> (19) That the exhibitor defendants, and each of them be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres, outside Nashville, Tennessee, in any town where there is already located a theatre, whether in operation or not, unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents or servants are guilty of any of the acts or practices prohibited by paragraph nine (9) hereof.

2. The Court erred in declining to enter in lieu of said paragraph (19) of the final decree the provision contained in paragraph (20) of the proposed decree submitted in accordance with the Court's conclusion of law No. 20, which provision reads as follows:

> [fol. 3247d] That the exhibitor defendants, and each of them, be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres outside Nashville, Tennessee, except after an affirmative showing before this Court that such acquisition will not unreasonably restrain competition.

Wherefore, plaintiff prays that the final order and decree of the District Court granting the relief set forth in para-

graph (19) thereof and denying relief in accordance with the Court's aforesaid conclusion of law No. 20 may be reversed and the cause remanded for the entry in lieu of said paragraph of a provision in accordance with said conclusion of law, and for such other and fit relief as the Court may deem just and proper.

Tom C. Clark, Assistant Attorney General; Robert L. Wright, Special Assistant to the Attorney General.

This 16th day of July, 1943.

[fol. 3247e] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed October 27, 1943

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the final order and decree of said District Court entered on May 17, 1943, in the above-entitled cause, and says that in the entry of the final order and decree the District Court committed error to the prejudice of the said plaintiff in the following particulars:

1. The Court erred in entering paragraph (19) of the final decree which reads as follows:

> (19) That the exhibitor defendants, and each of them be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres, outside Nashville, Tennessee, in any town where there is already located a theatre, whether in operation or not, unless the owner of such theatre should voluntarily offer to sell same to either of the exhibitor defendants, and when none of said defendants, their officers, agents or servants are guilty of any of the acts or practices prohibited by paragraph nine (9) hereof.

2. The Court erred in declining to enter in lieu of said paragraph (19) of the final decree the provision contained in paragraph (20) of the proposed decree submitted in accordance with the Court's conclusion of law No. 20, as originally filed on March 3, 1943, which provision reads as follows:

> [fol. 3247f] That the exhibitor defendants, and each of them, be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres outside Nashville, Tennessee, except after an affirmative showing before this Court that such acquisition will not unreasonably restrain competition.

Wherefore, plaintiff prays that the final order and decree of the District Court granting the relief set forth in paragraph (19) thereof and denying relief in accordance with the Court's aforesaid conclusion of law No. 20 may be reversed and the cause remanded for the entry in lieu of said paragraph of a provision in accordance with said conclusion of law, and for such other and fit relief as the Court may deem just and proper.

Wendell Berge, Assistant Attorney General; Robert L. Wright, Special Assistant to the Attorney General.

This 27 day of October, 1943.

[fol. 3247g] In the District Court of the United States

[Title omitted]

Order Allowing Appeal—July 16, 1943

In the above-entitled cause the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final order and decree of this Court in this cause entered on the 17th day of May, 1943, and having also made and filed its petition for appeal, assignment of errors and prayer for reversal, and statement of jurisdiction, and hav-

ing in all respects conformed to the statutes and rules in such cases made and provided,

It is therefore ordered and adjudged.

That the appeal be and the same is hereby allowed as prayed for.

Enter July 16, 1943.

Elmer D. Davies, United States District Judge.

Dated this 16th day of July, 1943.

[fol. 3247h] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—October 27, 1943

In the above-entitled cause the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final order and decree of this Court in this cause entered on the 17th day of May, 1943, and having also made and filed its petition for appeal, assignment of errors and prayer for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

It is therefore ordered and adjudged.

That the appeal be and the same is hereby allowed as prayed for.

Elmer D. Davies, United States District Judge.

Dated this 27th day of October, 1943.

[fol. 3247i] Citation in usual form, filed July 16, 1943, omitted in printing.

[fol. 3247j] Citation in usual form, filed Oct. 27, 1943, omitted in printing.

[fol. 3247k] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR RECORD—Filed July 16, 1943

To the Clerk of the United States District Court:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal herein and include in said transcript in the order given below the following papers, viz:

1. Complaint, as amended.
2. Answers of Crescent Amusement Company, Rockwood Amusement Company, Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Cumberland Amusement Company, Lyric Amusement Company, Inc., Anthony Sudekum, Kermit C. Stengel, Muscle Shoals Theatres, Louis Rosenbaum, and Nettie Sudekum.
3. The findings of fact and conclusions of law filed herein on March 3, 1943.
4. The proposed decree submitted by plaintiff in accordance with the Court's decision.
5. The official record of the stenographic minutes of the proceedings before the Honorable Elmer D. Davies, United States District Judge for the Middle District of Tennessee, on May 6, 1943.
6. Final decree of the District Court filed on May 17, 1943.

[fol. 3247l] 7. Petition for appeal.

8. Assignment of errors and prayer for reversal.
9. Order allowing appeal.
10. Proof of service.
11. Statement required by Rule 12.
12. Citation.
13. Statement of jurisdiction.
14. Praecipe.

Tom C. Clark, Assistant Attorney General; Robert L. Wright, Special Assistant to the Attorney General.

This 16th day of July, 1943.

[fol. 3247m] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME—August 23, 1943

In this case comes the plaintiff through its attorney Horace Frierson, and moves the Court for a sixty day extension of time within which the plaintiff may file the record in the Supreme Court pursuant to its appeal heretofore allowed herein.

And the Court being of the opinion that good cause has been shown for such enlargement or extension of time, the motion of the plaintiff is sustained and it is hereby ordered that the time within which the plaintiff may file said record be extended until October 25, 1945.

Enter: August 23, 1943.

(S.) Elmer D. Davies, U. S. District Judge.

[fol. 3247n] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME—October 22, 1943

In this case comes the plaintiff, through its attorney Horace Frierson, and moves the Court for a sixty day extension of the time within which the plaintiff may file the record in the Supreme Court pursuant to its appeal heretofore allowed herein.

And the Court being of the opinion that good cause has been shown for such enlargement or extension of time, the motion of the plaintiff is sustained and it is hereby ordered that the time within which plaintiff may file said record be extended until December 25, 1943.

Enter: Oct. 22, 1943.

Elmer D. Davies, U. S. District Judge.

[fol. 3247o] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

[File endorsement omitted]

PRAECIPE FOR RECORD—Filed October 27, 1943

To the Clerk of the United States District Court:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal herein and include in said transcript in the order given below the following papers, viz:

1. Complaint, as amended.

2. Answers of Crescent Amusement Company, Rockwood Amusement Company, Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Cumberland Amusement Company, Lyric Amusement Company, Inc., Anthony Sudekum, Kermit C. Stengel, Muscle Shoals Theatres, Louis Rosenbaum and Nettie Sudekum.

3. The findings of fact and conclusions of law filed herein on March 3, 1943.

4. The proposed decree submitted by plaintiff in accordance with the Court's decision.

5. Order setting hearing on all objections to decree on May 6, 1943, filed on April 20, 1943.

6. The official record of the stenographic minutes of the proceedings before the Honorable Elmer D. Davies, United States District Judge for the Middle District of Tennessee, on May 6, 1943.

[fol. 3247p] 7. Final decree of the District Court filed on May 17, 1943.

8. Petition of defendants Rockwood Amusement Company, Cherokee Amusements, Inc., and Kentucky Amusement Company, Inc., for modification in findings and conclusions, filed on March 23, 1943.

9. Petition of defendant Cumberland Amusement Company for reconsideration and modification of findings and conclusions, filed on March 23, 1943.

10. Supplemental petition of defendant Rockwood Amusement Company for reconsideration and modification of findings and conclusions filed on March 31, 1943.

11. Motion of Muscle Shoals Theatres and Louis Rosenbaum to modify and supplement findings and conclusions, filed on May 6, 1943.

12. Motion of defendant Crescent Amusement to amend findings and make additional findings, filed on May 27, 1943.

13. Amended findings and conclusions and order overruling all objections to findings and conclusions except as therein granted, filed on August 30, 1943.

14. Petition for appeal filed on July 16, 1943.

15. Petition for appeal filed on Oct. 27, 1943.

16. Assignment of errors and prayer for reversal, filed on July 16, 1943.

17. Assignment of errors and prayer for reversal, filed on Oct. 27, 1943.

18. Order allowing appeal, filed on July 16, 1943.

19. Order allowing appeal, filed on Oct. 27, 1943.

20. Proof of service, filed on July (19-20) 1943.

21. Proof of service, filed on Oct. 28, 1943.

22. Statement required by Rule 12, filed on July 16, 1943.

23. Statement required by Rule 12, filed on Oct. 27, 1943.

24. Citation, filed on July 16, 1943.

25. Citation, filed on Oct. 27, 1943.

[fol. 3247q] 26. Statement of jurisdiction, filed on July 16, 1943.

27. Statement of jurisdiction, filed on October 27, 1943.

28. Praecipe.

(S.) Wendell Berge, Assistant Attorney General:
Robert L. Wright, Special Assistant to the Attorney General.

This 27th day of October, 1943.

[fol. 3247r] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME—November 9, 1943

In this case comes the plaintiff through its attorney, Robert L. Wright, and moves the Court for a ten-day extension of time within which the plaintiff may file its counter praecipe pursuant to the appeal heretofore allowed the defendants herein.

And the Court being of the opinion that good cause has been shown for such extension of time, the motion of the plaintiff is sustained and it is hereby ordered that the time within which the plaintiff may file its counter praecipe be extended until November 19, 1943.

Enter: Nov. 9, 1943.

Elmer D. Davies, U. S. District Judge.

[fol. 3248] IN THE DISTRICT COURT OF THE UNITED STATES

PETITION FOR APPEAL—Filed October 29, 1943

Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Co., Inc., Anthony Sudekum and Kermit C. Stengel, defendants in the above entitled cause, considering themselves aggrieved by (1) the findings and conclusions filed by the Court on March 3, 1943, and the amended findings and conclusions filed on August 30, 1943, (2) action of the Court in overruling defendants' motion to strike certain evidence and exhibits introduced by plaintiff, and (3) the final order and decree of this Court entered on May 17, 1943, do hereby pray an appeal to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, the defendants present to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the defendants consider the action of the Court erroneous are set forth in the assign-
[fol. 3249] ment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

Defendants Pray that their appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final order and decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Defendants further Pray that during the pendency of their appeal the running of the period of one year as provided in paragraph (18) of the decree entered May 17, 1943, be suspended.

(S.) Geo. H. Armistead, Jr., D. L. Lansden, William Waller, American Trust Building, Nashville, Tennessee, Counsel for Defendants.

Dated this 28th day of October, 1943.

[fol. 3250] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed October 29, 1943

Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Co., Inc., Anthony Sudekum and Kermit C. Stengel, defendants in the above entitled cause, in connection with their petition for appeal to the Supreme Court of the United States, hereby assign error to the final order and decree of said District Court entered on May 17, 1943 in the above entitled cause, and to the findings and conclusions filed on March 3, 1943 and the amended findings and conclusions filed on August 30, 1943, and say that in the entry of the final order and decree and in the filing of said findings and conclusions and amended findings and conclusions the District Court committed error to the prejudice of the said defendants in the following particulars:

[fol. 3251] I

As to the Findings and Conclusions and Amended Findings and Conclusions:

1. The Court erred in including in Finding No. 39 and in failing to eliminate, as requested by defendants, the last two sentences reading as follows:

"He (Lawing) was unable to secure any other major product nor would any of the distributors sell him a second run; the ostensible ground of refusal was that

the town was too small for a second run. But the Crescent was allowed to repeat pictures which had played Lawing's theatre in Brownsville, a much smaller town."

And in failing to add, as requested by defendants, the following:

"There is no satisfactory evidence that Lawing was unable to secure sufficient product or satisfactory product on which to operate in Paris. He made no application for Universal product or for United Artists product at Paris."

2. The Court erred in including in Finding No. 44 and in failing to eliminate, as requested by defendants, the concluding portion reading as follows:

"This could not possibly have been Connors' reason for rejecting Lawing's application, however, because, first, there is nothing to show that Connors ever told anyone Lawing's offer was inadequate, and second, Lawing's office, as a matter of fact, was as good as, [fol. 3252] if not better than, the deal Loew's accepted from Crescent. Connors further explained, in justification for his decision overruling Willingham's recommendation, that he knew that Lawing's theatre was not as modern as the new Crescent Theatre, and he felt that Metro could get more money from the new theatre. This was also an afterthought, as there is no suggestion in the voluminous correspondence regarding this situation introduced in evidence by both sides that the relative merits of the theatres entered into his decision, nor was there any necessity for Connors to speculate about what he could get from the two theatres because he had both offers before him, and by the simple process of comparing the two offers, he would have ascertained that from the standpoint of Loew's, the Lawing deal was as good as, if not better than, the Crescent offer."

3. The Court erred in including in Finding No. 45 and in failing to eliminate, as requested by defendants, the last paragraph reading as follows:

"Thus, as far as the disposition of Loew's 1935-1936 product in Brownsville, Tennessee is concerned, the

record shows that it was licensed to Crescent although Lawing offered Loew's at least as good a deal as the Crescent deal and was Loew's old customer in Brownsville."

And in failing to add, as requested by defendants, the following:

[fol. 3253] "Lawing's record for carrying out his contracts was very bad. He admitted on cross-examination that, even before Crescent's theatre was opened, he failed to comply with contracts with more than one distributor."

4. The Court erred in failing to supplement Finding No. 46 by adding the following, as requested by defendants:

"There is no evidence that Lawing had trouble getting satisfactory product or sufficient product in Brownsville. There is no evidence that he even applied for either Universal product or United Artists product after Crescent opened its theatre."

5. The Court erred in including in Finding No. 48 and in failing to eliminate, as requested by defendants, the following language in the first paragraph:

"In April 1935, Dozier entered into a contract for Paramount's 1935-1936 product which provided that Dozier was to have clearance over Madisonville, but the length of the clearance was to be decided by the N. R. A. Clearance Board at Indianapolis."

And the following language in the third paragraph:

"although it was in direct conflict with his agreement with Paramount."

6. The Court erred in failing to supplement Finding No. 54, as requested by defendants, by adding in substance the following:

[fol. 3254] "The actual comparison of the film rentals received by Warner Bros. from Miller in 1936-1937 and Cumberland in 1937-1938 was as follows:

	Features	Scores	Shorts	Total
1936-37—Miller	$858.84	$145.00	$184.50	$1188.34
1937-38—Cumberland	975.00	135.00	440.50	1550.50

7. The Court erred in including in Finding No. 59 and in failing to eliminate, as requested by defendants, the concluding paragraph reading as follows:

> "The Huntingdon deal for the 1938-39 season was only $37.00 higher than the 1937-38 deal when it did not have clearance over McKenzie, and this increase was not in payment for the switch in runs because it represented the identical season-to-season increase called for by the franchise in other Rockwood situations where no change in clearance was involved. Insofar as Huntingdon and McKenzie are concerned, Paramount lost money by switching the runs. Why then did the change occur? This is answered by Morgan's letter to Unger, Paramount's southern division sales manager, on August 6, 1938, in which he said:
>
> > 'With further reference to your letter of July 28, regarding the letter that Mr. Y. D. Moore, of McKenzie, Tennessee, wrote to Mr. Agnew. I have discussed the matter several times with Mr. Sudekum, and he insists that Huntingdon have protection over McKenzie.'"

8. The Court erred in including in Finding No. 63 and in failing to eliminate, as requested by defendants, the second paragraph reading as follows:

> [fol. 3255] "The deal with Sudekum referred to by Loew, was the franchise dated July 28, 1938, as of November 1, 1937. Clause 8(e) of that franchise gave Crescent the option of playing an additional or repeat run on any picture if played first-run in Hopkinsville and all of the other towns outside Nashville where a first run was licensed. By this option Crescent was able to prevent Anderson from obtaining any second-run feature although it made no commitment to use them itself."

9. The Court erred in including in Finding No. 70 and in failing to eliminate as requested by defendants, the concluding portion of the first paragraph reading as follows:

> "One reason Smith was advised that Paramount Pictures were not available to him second-run was because of the repeat-run option in the same franchise. This

is clearly indicated by the following portion of Morgan's letter to Unger of November 11, 1938, which was in response to a letter from Unger to Morgan, written after Smith had complained to the Department of Justice, directing Morgan to make some pictures available for Smith (Ex. 152):

> Now as regards the last paragraph of your letter about second runs, following shows the population of each town:
>
> | | |
> |---|---|
> | Morristown | 5,875 |
> | Harriman | 5,000 |
> | Newport | 2,753 |
>
> In any event, the only way we could sell second run, even if we wanted to in these particular towns, would be after Sudekum had taken the refusal, because Paragraph E of article 8 of the Crescent Amusement Company franchise, provides he can repeat any feature at a certain given price."

[fol. 3256] 10. The Court erred in including in Finding No. 81 and in failing to eliminate as requested by defendants, the concluding sentence of the last paragraph reading as follows:

> "The negotiation and execution of the ryler at this time showed that Crescent intended, if necessary to eliminate Henry, to operate all three theatres, and Paramount was willing to cooperate."

11. The Court erred in including in Finding No. 100 and in failing to eliminate, as requested by defendants, the first paragraph reading as follows:

> "Curry didn't attempt to negotiate with Paramount because it was well understood that the Crescent Amusement Company had a first-run franchise and second-run option.' The franchise provides both a first run in Gadsden and a first run in Alabama City with a repeat-run option."

And in failing to insert in lieu thereof, as requested by defendants, the following:

> "Curry testified that he didn't try to negotiate with Paramount for second-run product because it was well understood that Crescent 'had a first-run franchise and

a second-run option, so he didn't even have the heart to go to see them.' The fact was that the Dixie Theatre already had a second-run contract with Paramount made by Curry's predecessor covering specified pictures of the 1938-1939 product and that Crescent [fol. 3257] had a second run contract (not an option) with Paramount making a definite commitment for twenty photoplays of the 1939-1940 product, with only thirty days after first run play date to notify Paramount of its intention to use said picture for second run in one of its three Gadsden theatres. The Dixie Theatre thus had full opportunity to purchase the rejected pictures and could always know, within thirty days after first run exhibition in Gadsden, whether the particular picture was available. The pictures selected by Crescent had to be played at the rate of two per month, as available, so that the Dixie Theatre was not prejudiced if it desired to play these pictures on third run."

And in including and failing to eliminate, as requested by defendants, the third paragraph reading as follows:

"Fox, Loew, Paramount, United Artists and Warner all held the Dixie back of the Ritz, although there was no clearance provision in their contracts with the Ritz which would require them to do so. Their uniformity in holding a superior theatre behind an inferior one may only be explained by the pressure which Sudekum was able to exert on each of these distributors."

And in failing to insert in lieu thereof, as requested by defendants, the following:

"The Dixie Treatre paid much smaller film rentals than Crescent paid with respect to the Ritz theatre at Alabama City, which had been set up as a first-run [fol. 3258] situation when Alabama City was a separate municipal corporation, by Fox, Loews, Paramount and Warner, as well as by United Artists."

12. The Court erred in including in Finding No. 118 and in failing to eliminate, as requested by defendants, the concluding paragraph reading as follows:

"The effect of the franchise (Ex. p. 21, p. 29, and p. 30), on the independent competition at Dresden,

Earlington, Gallatin, McKenzie, Spruce Pine, Union City, Hopkinsville, Gadsden, Morristown, Harriman, Newport and Mt. Pleasant has already been recounted. Morgan, in negotiating it, knew precisely what its effect on these independent accounts would be."

13. The Court erred in including in Finding No. 119 and in failing to eliminate, as requested by defendants, the first paragraph reading as follows:

"The repeat-run clause in the franchise was completely effective in preventing the sale of a second-run of any Paramount features to any opposition theatre, as shown by the experience of Smith, Anderson and Henry when they tried to buy a second-run. As Morgan described its effect in a letter to Unger, his immediate superior, on November 14, 1939 (Ex. 152):

'In any event, the only way we could sell second-run, even if we wanted to in these particular towns (Harriman, Morristown and Newport) would be after Sudekum had taken the refusal, because Paragraph E of Article 8 of the Crescent Amusement Company franchise provides he can repeat any feature at a given price.'"

And in including in the second paragraph and failing to eliminate, as requested by defendants, the following sentence:

[fol. 3259] "The clause, as modified, still prevents the sale of a second-run to the opposition."

14. The Court erred in including in Finding No. 122 and in failing to eliminate, as requested by defendants, the three concluding paragraphs reading as follows:

"But even with one theatre closed and its second-run commitment out of the way, the exhibitors obviously wished to still be in a position to prevent a competitor from getting a second run. The last paragraph, giving a repeat-run option where one theatre is closed, was plainly an addition to the rider insisted upon by the exhibitors, as it confers no rights or advantages on the distributor. Unlike the Paramount repeat-run clause, this option was so worded as to make the

repeat-run subject to such other runs in the same town as the distributor might license. The only purpose that this clause could serve was to make it difficult for Warner to license a second-run theatre in opposition to Crescent after Crescent shut one theatre and got rid of its second-run commitment.

"The purpose of the repeat-run option was plainly to replace the second-run commitment as a means of tying up second run in the situations where that commitment was subject to elimination upon closing a theatre, as in the situations where no second-run commitment was made, a straight repeat-run privilege was inserted which does not depend on the closing of a theatre to take effect. Thus in Harriman and Morristown, where Crescent was also operating two theatres, [fol. 3260] but no second-run commitment was made, the repeat-run clause reads as follows:

'KCS. Exhibitor shall have the right to repeat any feature at the lowest allocated rentals subject to all runs and clearance which may now exist or may hereafter be granted to other exhibitors in Harriman, Tennessee, and in such event the exhibitors commitment to exhibit such features in the lowest rental classification shall be reduced accordingly.'

"The only difference between this and the repeat-run clause previously quoted is in the stricken opening phrase: 'In the event one theatre closes'. In all of the one-theatre situations in which no second run was bought, the same unqualified repeat-run clause as that stated above was used."

15. The Court erred in including in Finding No. 127 and in failing to eliminate, as requested by defendants, the two concluding paragraphs reading as follows:

"Even though the independents in the towns where there was then opposition, Earlington, Gadsden, Maryville, Paris and Hartselle, paid Fox more than it received from Sudekum, the total revenue from them added up to only 'about seven or eight thousand dollars.' The Sudekum franchise offered a total rental of better than $120,000.00 for all situations for the three years' product and that being the case, this product was sold away from the independent exhibitors at the

'opposition points', who had bought the 1935-1936 product, without giving them any opportunity to negoti-[fol. 3261] ate for the next season. Everyone of these independents, who paid more than Sudekum in their individual situations but could not collectively match his total Circuit purchase, was eventually taken over by Crescent or Rockwood before the expiration of the franchise in August, 1939.

"Hendren's letter of February 7, 1936 (Ex. 258) indicates that if he could have gotten the Fox 1936-37 product he would have discontinued negotiations with Sudekum for the sale of Maryville and Greenville. For the 1935-36 feature product in Maryville, he paid $2,456.61 as against $575.00 paid by Crescent for the 1934-35 feature product and $1,080.00 paid by Crescent for the 1936-37 feature product (Ex. 327) in the same town. For the 1935-36 feature product in Greenville he paid $2,589.00 against $1,095.00 paid by Crescent for 1937-38 (Ex. 328)."

16. The Court erred in including in Finding No. 133 and in failing to eliminate, as requested by defendants, the first two sentences reading as follows:

"One obvious purpose of all three franchises was to give Fox, Warner, and Paramount an ostensibly valid legal excuse for discriminating in favor of the Sudekum circuit in licensing its films during the period covered in the same manner that they had discriminated in the past. The Sudekum circuit, by virtue of having built up a preponderance of closed situations, through the persistent elimination of competition, was in a position to deal effectively with such competition [fol. 3262] as remained or might arise in the future, in making one-year film deals, but franchises offered protection against future changes in those discriminatory practices."

17. The Court erred in overruling the following general exception of defendants to the findings and conclusions filed on March 3, 1943:

"Defendant excepts not only to the findings hereinbefore specifically conferred to, but to all findings and parts of findings adopted from the Government's brief

and to the conclusions based upon such findings, upon the ground that the method thus used was improper and unfair to defendant exhibitors and did not constitute a weighing of the evidence by the Court. A copy of the Government's said brief is filed herewith as a part of these motions and reference made to same for purposes of comparison. Defendant accordingly moves the Court to amend the findings filed March 3, 1943 by eliminating all such findings and parts of findings."

18. The Court erred in overruling the following general exception of defendants to the findings and conclusions filed on March 3, 1943:

"Defendant further excepts to all findings and parts of findings predicated upon unsworn statements, either written or oral, made by employees of distributors and other third persons, upon the ground that such unsworn statements are both hearsay and *res inter alios acta*. Defendant accordingly moves the Court to amend the findings filed March 3, 1943 by eliminating all such findings and parts of findings."

[fol. 3263] II

As to Rulings on Evidence:

19. The Court erred in overruling defendants' motion, made at the conclusion of plaintiff's evidence in chief, to strike the following portions of plaintiff's proof and exhibits:

"24. All inter-office or inter-company memoranda and correspondence of Universal. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Universal, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

"25. All inter-office or inter-company memoranda and correspondence of United Artists. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and United Artists, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

"26. All inter-office or inter-company memoranda and correspondence of Columbia. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of [fol. 3264] conspiracy between defendant exhibitors and Columbia, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

"27. All inter-office or inter-company memoranda and correspondence of RKO. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and RKO, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

"28. All inter-office or inter-company memoranda and correspondence of Fox. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Fox, and no such case has been proven. In any event, said ex-

hibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of [fol. 3265] their duties, and these facts are not relevant or material to any issue in the case.

"29. All inter-office or inter-company memoranda and correspondence of Paramount. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Paramount, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

"30. All inter-office or inter-company memoranda and correspondence of Warner Brothers. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Warner Brothers, and no such case has been proven. In any event, said exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case.

"31. All inter-office or inter-company memoranda and correspondence of Loew's. These exhibits were provisionally admitted, subject to being stricken if plaintiff should fail to prove a prima facie case of conspiracy between defendant exhibitors and Loew's, and no such case has been proven. In any event, said [fol. 3266] exhibits are no proof of the truth of their contents, because the only evidence relating to them is that the letters and memoranda were written by the persons who purported to have written them in the course of their respective duties, and these facts are not relevant or material to any issue in the case."

III

As to the Final Order and Decree:

20. The Court erred in including in the final order and decree entered May 17, 1943, paragraph (1), reading as follows:

> "(1) That the defendants, The Crescent Amusement Company, a corporation, Muscle Shoals Theatres, a partnership, Rockwood Amusements, Inc., Cherokee Amusements, Inc., Lyric Amusement Company, Inc., and Kentucky Amusement Company, Inc., be, and they hereby are, enjoined and restrained from continuing in combination with each other and with each of the distributors, Paramount, Fox and Warner, in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further [fol. 3267] enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects."

21. The Court erred in including in the final order and decree entered May 17, 1943, paragraphs (8) and (12), reading as follows:

> "(8) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be, and it hereby is, enjoined and restrained from combining its closed towns with its competitive situations, in licensing films for the purpose and with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate against its independent competitors in licensing films."
>
> "(12) That each exhibitor defendant be, and hereby is, enjoined and restrained from conditioning the licensing of films in any competitive situation outside Nashville, Tennessee, upon the licensing of films in any other theatre situation."

[fol. 3268] 22. The Court erred in including in the final order and decree entered May 17, 1943, paragraph (13), reading as follows:

"(13) That each of the corporate exhibitor defendants be, and it hereby is, required to divest itself of the ownership of any stock or other interest in any other corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc., and each such defendant is hereby enjoined and restrained from acquiring the ownership of any stock or other interest in any other corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc."

23. The Court erred in including in the final order and decree entered May 17, 1943, paragraph (15), reading as follows:

"(15) That the defendant, Anthony Sudekum, be and he is hereby, required to resign as an officer of any corporation except the Crescent Amusement Company which is affiliated with any exhibitor defendant, and said defendant, is enjoined and restrained from acquiring any control over any such affiliated corporation, except the Crescent Amusement Company, by acting as an officer thereof, or otherwise."

24. The Court erred in including in the final order and decree entered May 17, 1943, paragraph (16), reading as follows:

[fol. 3269] "(16) That the defendant, Kermit C. Stengel, be, and he hereby is, required to resign as an officer of any corporation, except one defendant corporation of his choice, which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, except the corporation of his choice, by acting as an officer thereof, or otherwise."

25. The Court erred in including in the final order and decree entered May 17, 1943, paragraph (18), reading as follows:

"(18) That the acts of dissolution described in paragraphs (13), (14), (15), and (16) hereof, shall be performed within one year from date of entry of this decree."

26. The Court erred in including in the final order and decree entered May 17, 1943, paragraph (21), reading as follows:

"(21) That the costs of this action shall be taxed against the exhibitor defendants."

Wherefore, defendants pray that the action of the District Court on August 30, 1943, in filing amended findings and conclusions but in failing to amend the findings and conclusions filed on March 3, 1943 as hereinbefore set forth, and the action of the District Court in including in the final order and decree of May 17, 1943, the paragraphs hereinbefore set forth, may be held erroneous and said decree [fol. 3270] accordingly reversed and the cause remanded for the amendment of said findings and conclusions and the elimination of said paragraphs in the decree, and for such other and fit relief as the Court may deem just and proper.

(S.) Geo. H. Armistead, Jr., D. L. Lansden, William Waller, American Trust Building, Nashville, Tennessee, Counsel for Defendants.

Dated this 28th day of October, 1943.

[fol. 3271] In the District Court of the United States

[Title omitted]

Order Allowing Appeal—Entered October 29, 1943

In the above entitled cause, defendants, Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Co., Inc., Anthony Sudekum, and Kermit S. Stengel, having made and filed their petition praying an appeal to the Supreme Court of the United States from the findings and conclusions filed by the Court on March 3, 1943, the amended findings and conclusions filed on August 30, 1943, and the final order and decree entered on May 17, 1943, and having also filed their assignment of errors and prayer for reversal and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

It is therefore ordered and adjudged that the appeal be and the same is hereby allowed as prayed for, and that said defendants give a bond with good and sufficient security in the sum of $2000.00 that they as appellants shall prosecute their appeal to effect and answer all costs, if they fail to make their appeal good.

It is further ordered and adjudged, as prayed by the above named defendants, that during the pendency of said appeal the running of the period of one year as provided in paragraph (18) of the decree of May 17, 1943, be suspended.

Enter Oct. 29, 1943.

Elmer D. Davies, United States District Judge.

Dated this 28th day of October, 1943.

[fols. 3272-3275] Bond on appeal for 2,000.00 approved and filed Oct. 29, 1943, omitted in printing.

[fols. 3276-3286] Citation in usual form, entered Oct. 29, 1943, omitted in printing.

[fol. 3287] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION FOR SHORTENING RECORD ON APPEAL—Filed November 26, 1943

It is stipulated by and between appellee, United States of America, and appellants, The Crescent Amusement Company, et al., that in making up the record on appeal there need not be included Exhibit B to Answer of The Crescent Amusement Company, et al., to Supplement to Complaint, being the answers of defendants to the amended complaint filed in the District Court of the United States for the Southern District of New York on November 14, 1940, in the case entitled, "United States of America, petitioner vs. Paramount Pictures, Inc., defendants".

It is further stipulated there need not be included in the record on appeal plaintiff's printed brief in this case, filed October 15, 1941, and also filed by the Crescent Amusement [fol. 3288] Company, et al., as a part of their motion filed May 23, 1943, to amend the findings filed March 3, 1943. In

lieu of including said plaintiff's brief, it is stipulated that a comparison of the Findings and Conclusions filed March 3, 1943, with said brief will show:

(a) That the Findings numbered 11 to 67, inclusive, correspond with language in plaintiff's printed brief at pages 6 to 77, inclusive, with the exception of the last paragraph of Finding No. 52 and the first paragraph of Finding No. 67.

(b) That the Findings numbered 70 to 81, inclusive, correspond with language in plaintiff's printed brief at pages 78 to 91, inclusive.

(c) That the Findings numbered 83 to 98, inclusive, correspond with language in plaintiff's printed brief at pages 97 to 122, inclusive, with the exception of the second paragraph in Finding No. 94.

(d) That the Findings numbered 100 to 110, inclusive, correspond with language in plaintiff's printed brief at pages 122 to 132, inclusive, with the exception of the concluding paragraph of Finding No. 100 and with the further exception of the designation in Finding No. 101 of J. W. Baird as "President of Newport Amusement Company, an affiliate of Crescent".

(e) That the Findings numbered 114 to 133, inclusive, correspond with language in plaintiff's printed brief at pages 133 to 185, inclusive.

(f) That references to the record given in the brief are not included in the Findings, except where the references [fol. 3289-3299] are to exhibit, and at intervals sentences or paragraphs in the brief are omitted in the Findings. The numbers assigned the Findings are not found in the brief.

It is further stipulated that appellants, The Crescent Amusement Company, et al., shall have to and including November 29, 1943, within which time to file an amended praecipe, which shall supersede the praecipe heretofore filed by them, and appellee shall have ten additional days within which to file a counter praecipe.

This stipulation shall be filed as a part of the record in the cause and included in said amended praecipe.

Dated this November 23, 1943.

Robert L. Wright, Special Assistant to Attorney General. George H. Armistead, Jr., William Waller, Counsel for Appellants, The Crescent Amusement Company, et al.

[fol. 3300] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR RECORD—Filed November 5, 1943

To the Clerk of the United States District Court:

In connection with the appeal allowed the United States of America on October 22, 1943 in the above entitled case, please include in the transcript of the record the following papers, viz.:

1. Petition for appeal filed by United States of America on July 16, 1943.
2. Order allowing said appeal entered July 16, 1943.
3. Citation issued July 16, 1943.
4. Acknowledgment of service of appeal papers.
5. Defendants' motion to dismiss said appeal.
6. Order extending time for filing record entered August 23, 1943.
7. Order extending time for filing record entered October 22, 1943.
8. Statement of defendants opposing jurisdiction on second appeal.

[fol. 3301] 9. Motion to dismiss second appeal.

10. This Praecipe.

William Waller, Geo. H. Armistead, Jr., D. L. Lansden, Attorneys for Defendants. Address; American Trust Building, Nashville, Tennessee.

Dated this November 5th, 1943.

[fol. 3302] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AMENDED PRAECIPE FOR RECORD—Filed November 26, 1943

To the Clerk of the United States District Court:

Please disregard the Praecipe heretofore filed on October 29, 1943 (dated October 28, 1943) and prepare a transcript of the record in the above entitled cause, in the matter of the

appeal herein, and include in said transcript, in the order given below, the following papers, viz.:

1. Complaint.
2. Motions of defendants, The Crescent Amusement Company et al., to strike portions of complaint and for bill of particulars.
3. Opinion of the Court dated February 21, 1940.
4. Order of the Court entered February 23, 1940 on motions of The Crescent Amusement Company et al.
5. Bill of particulars filed May 22, 1940 in response to motion of The Crescent Amusement Company et al.

[fol. 3303] 6. Order entered August 16, 1940.

7. Answer of defendant exhibitors, Anthony Sudekum, et al.
8. Orders entered January 3, 1941, dismissing complaint as to certain defendants and amending complaint by striking paragraphs 50-53, inclusive, thereof.
9. Additional bill of particulars filed in response to motions of defendants, The Crescent Amusement Company et al.
10. Second additional bill of particulars filed in response to motion of The Crescent Amusement Company et al.
11. Third additional bill of particulars filed in response to motion of The Crescent Amusement Company et al.
12. Supplemental answer of defendants.
13. Supplement to complaint and order allowing same to be filed.
14. Answer of The Crescent Amusement Company et al. to supplement to complaint, excluding Exhibit B thereto.
15. Request to stipulate served on plaintiff on July 12, 1941, by defendants, Anthony Sudekum et al.
16. Plaintiff's response to request to stipulate.
17. The following portions of plaintiff's evidence in the case, including the testimony of plaintiff's witnesses hereinafter mentioned and exhibits filed and read to the Court in connection with said evidence, and objections of counsel to admissibility of such evidence and exhibits, to-wit:

[fol. 3304]

pp. 342-429	(Hendren)
pp. 673-702	(Pittman)
pp. 759-819	(Lawing)
pp. 820-970	(Dozier)

pp. 971-1057	(Miller)
pp. 1210-1225	(Perdue)
pp. 1226-1250	(Currey)
pp. 1251-1341	(Bailey)
pp. 1396-1574	(Smith)
pp. 1575-1635	(Anderson)
pp. 1708-1862	(Morgan)
pp. 1863-1946	(Willingham)
pp. 1947-1990	(Avey)
pp. 1991-1999	(Avery)
pp. 2195-2230	(Kirk)
pp. 2255-2279	(Ballance)
pp. 2280-2316 and 2341-2346	(Wilson)
pp. 2251-2464	(Baird)
pp. 2465-2578	Ruffin)
pp. 2595-2613; also R. 2723-2725	(Hendren)

18. The following plaintiff's exhibits not read into the evidence:

P 16;
P 23;
P 24;
P. 29;
P 30;
F 8;
F 12;
W 14.

Government Exhibits 294-297, inclusive.

[fol. 3305] 19. Motions of defendants made at conclusion of plaintiff's evidence in chief, including motion to strike portions of plaintiff's evidence and exhibits, made August 5, 1941, and the portions of the transcript at pp. 3357-3362 and 3789-3799 relating to said motions and the action of the Court thereon.

20. The following portions of defendants' evidence in the case, including the testimony of defendants' witnesses hereinafter mentioned and exhibits filed and read to the Court in connection with said evidence, and objections of counsel to admissibility of such evidence and exhibits, to-wit:

pp. 3812-3933	(Sudekum)
pp. 2000-2030	(Connors)

pp. 4251-4351	(Morgan)
pp. 4367-4421	(Kalmenson)
pp. 4422-4461	(Kupper)
pp. 4462-4519	(Wilson)
pp. 4643-4847 and 5259-5341	(Stengel)
pp. 5053-5092	(Agnew)
pp. 5342-5352 and 5401-5402	(Stipulations)

21. The following defendants' exhibits not read into the evidence:

Defendants' Exhibits 58, 136, 215, 216, 217, 220-228, inclusive, and F-15.

22. "Findings and Conclusions" filed March 3, 1943.

23. Petition of Cumberland Amusement Company for reconsideration and modification of findings and conclusions filed March 23, 1943.

[fol. 3306] 24. Petition of defendants, Rockwood Amusements, Inc. et al. for modification of findings and conclusions, filed March 23, 1943.

25. Final decree entered May 17, 1943.

26. Motion of defendant, The Crescent Amusement Company, to amend findings and make additional findings, filed May 27, 1943, excluding copy of plaintiff's brief filed as a part of said motion.

27. Motion of defendants, Cumberland Amusement Company et al. to amend findings and for additional findings, filed May 27, 1943.

28. Paper entitled "Amended Findings and Conclusions" filed August 30, 1943.

29. Petition for appeal.

30. Assignment of errors and prayer for reversal.

31. Order allowing appeal of The Crescent Amusement Company, et al.

32. Appeal Bond of The Crescent Amusement Company, et al.

33. Proof of service of appeal papers.

34. Statement required by Rule 12.

35. Citation.

36. Statement of jurisdiction.

37. Stipulation dated November 23, 1943.

38. This amended praecipe.
39. Order enlarging Time for Filing Record.

(S.) D. L. Lansden, William Waller, George H. Armistead, Jr., Counsel for Defendants. Address: American Trust Bldg., Nashville, 3, Tenn.

Dated this November 26, 1943.

[fol. 3307] Service of the foregoing Amended Praecipe and receipt of copy thereof is hereby acknowledged this November 26th, 1943.

(S.) Horace Frierson, United States District Attorney.

[fol. 3308] In the District Court of the United States

[Title omitted]

Order Enlarging Time—November 26, 1943

In this cause come the parties through their attorneys and move the Court that the time be extended to and including February 7, 1944, within which the parties may file the record in the Supreme Court pursuant to the appeal heretofore allowed plaintiff on October 27, 1943, and the appeal heretofore allowed certain of defendants on October 29, 1943.

And the Court being of the opinion that good cause has been shown for such enlargement or extension of time, the motion of the parties is sustained and it is hereby ordered that the time for filing said record be extended to and including February 7, 1944.

Enter: Nov. 26th, 1943.

Elmer D. Davies, United States District Judge.

[fol. 3309] In the District Court of the United States

[Title omitted]

Order—January 11, 1944

On motion of appellants, Crescent Amusement Company, et als., supported by affidavit of Kermit C. Stengel, to correct an alleged error on page 4845 of the transcript of evi-

dence, and the Court having no independent recollection or memorandum as to the language sought to be corrected, and it appearing that the stenographer's notes have been destroyed, it is ordered that said affidavit of Kermit C. Stengel be filed and made a part of the record in the cause.

The Clerk will include a copy of said affidavit and a copy of this order in the transcript of the record on appeal.

Approved for entry:

(S.) Geo. H. Armistead, Jr., William Waller, Attorneys for Appellants. Horace Frierson, U. S. Atty.

Enter: Jan. 11, 1944.

Elmer D. Davies, Judge.

[fol. 3310] [File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF KERMIT C. STENGEL—Filed January 11, 1944

KERMIT C. STENGEL, being first duly sworn, states as follows:

On page 4845 of the transcript in the above case the following appears:

"By Mr. Waller, for Defendants:

Q. Mr. Stengel, you recall that there was a second run Fox contract in this theatre in East Gadsden, the Dixie Theater, in East Gadsden, when Mr. Crawford was the Manager of that theater?

A. Yes.

Q. Is that what you were mentioning, what we were talking about during the noon recess?

A. That is what I was talking to you about. When we told them we couldn't take but so many at a time, they went ahead and sold what we would want them to sell."

In regard to the language shown in affiant's second answer "they went ahead and sold what we would want them to sell", affiant states that he did not make this statement,

or at least did not intend to make it. Affiant did not know, at the time Crescent was negotiating for second-run Fox pictures for Gadsden, that the Dixie Theatre in East Gadsden was negotiating for Fox pictures, but during the trial of this case he learned that Fox did make a deal [fol. 3311] with the Dixie Theatre after Fox had refused to make a deal with Crescent for a small number of pictures for second-run exhibition. Affiant believes that he said, or intended to say "they went ahead and sold what they wanted to sell", or words to that effect. Affiant certainly did not say, or intend to say, that Fox sold what "we" wanted them to sell.

This January 10th, 1944.

(S.) Kermit C. Stengel.

Subscribed to and sworn before me this January 10th, 1944. (S.) Webb Hays, Notary Public. My Commission Expires 3-7-44.

[fols. 3312-3313] IN THE DISTRICT COURT OF THE UNITED STATES

STIPULATION AS TO RECORD ON APPEAL—Filed January 12, 1944

In order to avoid duplication, it is stipulated that the record on appeal of United States of America, allowed October 27, 1943, and the record on appeal of The Crescent Amusement Company, et al., allowed October 29, 1943, be consolidated and that the sequence of papers and documents set forth in the praecipes may be altered by the Clerk in transmitting the record, to the end that such duplicatfon be avoided and the papers and documents included in a logical sequence, as determined by the Clerk. A copy of this stipulation shall be included in the record on appeal.

This January 12, 1944.

George H. Armistead, Jr., William Waller, Attorneys for Crescent Amusement Company, et al.

Horace Frierson, U. S. District Attorney; S. E. Wasson, Asst. U. S. District Attorney.

[fol. 3314] Public Law 195—78th Congress

Chapter 332—1st Session

S. 630

An Act

To Amend Section 107 of the Judicial Code, as amended, to Change the Terms of the District Court for the Middle District of Tennessee

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That effective January 1, 1944, so much of the second sentence of section 107 (c) of the Judicial Code, as amended, as precedes the proviso is amended to read as follows: "Terms of the district court for the Nashville division of said district shall be held at Nashville on the fourth Monday in January and the fourth Monday in September; for the Columbia division at Columbia on the first Monday in May and the second Monday in November; and for the Northeastern division at Cookeville on the second Monday in June and the first Monday in December."

Approved December 3, 1943.

Attest: A True Copy. L. B. Ormes, Clerk, U. S. District Court, Middle District of Tennessee, by H. M. Hutchison, D. C. (Seal.)

[fol. 3315] CERTIFICATE OF CLERK

UNITED STATES OF AMERICA,
Middle District of Tennessee,
Nashville Division, ss:

I, L. B. Ormes, Clerk of the District Court of the United States, in and for the Middle District of Tennessee, do hereby certify that the foregoing pages, numbering from one to thirty-three hundred and fifteen, inclusive, the same being divided into fifteen volumes, numbering from one to fifteen inclusive, contain a true, correct and complete record as called for in the plaintiff's praecipe which were duly filed by the attorneys for the plaintiff herein on July 16, 1943 and October 27, 1943, and also as requested by defendants' designations of additional portions of the record, and praecipes, which were filed by defendants' attorneys herein on July 27, 1943; August 13, 1943; November 5, 1943; and November 26, 1943.

I further certify that this record is in accordance with the stipulations, filed in this cause, which are herein included, except there appears a duplication of portions of the record which was determined necessary by the undersigned trial clerk; therefore, the stipulation filed January 12, 1944, is not fully adhered to.

I further certify that the annexed and foregoing original exhibits, composing a part of this record by direction of court order dated January 11, 1944, are original exhibits as filed on their respective filing dates during the trial of this case.

I certify further that the foregoing pages are a complete record, as requested by said plaintiff and defendants in this cause set out in the caption hereto, as the same appears from the records in my office and the file in this action.

Witness my hand as Clerk and Seal of said Court at Nashville, Davidson County, Tennessee, district and division aforesaid, on this 27th day of January, A. D. 1944, and of the Independence of the United States of America the 168th year.

L. B. Ormes, Clerk. (Seal.)

[fol. 3316] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1943

Nos. 662-663

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION—Filed February 17, 1944

The appellant, United States of America, intends to rely upon each of its two assignments of error and adopts them as its statement of points to be relied upon. It will urge that the District Court erred:

(1) In holding that an injunction against future theatre acquisitions by the defendants, which merely restrained such acquisitions when they occurred in a town where there was already a theatre and were accompanied by coercion or predatory practices, was adequate to prevent threatened elimination of competition by acquisition of competing independent theatres.

(2) In not holding that the Government was entitled to an injunction prohibiting such acquisitions except after an

affirmative showing before the Court that such an acquisition would not unreasonably restrain competition.

Said appellant herewith designates as necessary for printing in the record, the complaint as amended, the answers of Crescent Amusement Company, Rockwood Amusement Company, Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Cumberland Amusement Com-[fol. 3317] pany, Lyric Amusement Company, Inc., Anthony Sudekum, Kermit C. Stengel, Muscle Shoals Theatres, Louis Rosenbaum and Nettie Sudekum, the proposed decree submitted by plaintiff in accordance with the Court's decision of March 3, 1943, the order of April 20, 1943, setting a hearing on objections to the decree for May 6, 1943, the transcript of said hearing on May 6, 1943, the petition of defendants Rockwood Amusement Company, Cherokee Amusements, Inc., and Kentucky Amusement Company, Inc., for modification in findings and conclusions, filed on March 23, 1943, the petition of defendant Cumberland Amusement Company for reconsideration and modification of findings and conclusions, filed on March 23, 1943, supplemental petition of defendant Rockwood Amusement Company for reconsideration and modification of findings and conclusions filed on March 31, 1943, the motion of defendant Crescent Amusement Company to amend findings and make additional findings, filed on May 27, 1943, the order of August 30, 1943, overruling objections to findings, all of the appeal papers filed by said appellant and the orders allowing its appeals.

It has omitted from the foregoing designation the answer of Crescent Amusement Company to the supplement to the complaint, the Court's findings and conclusions and the final decree inasmuch as said documents are included in the portion of the record specified for printing by the appellees herein (appellants in No. 664). It has omitted the objections to the findings made by defendant Rosenbaum as he has filed no appeal.

The foregoing designation calls for the printing of all of volumes I and II of the record except pages 19 to 169, inclusive, 320 to 325, inclusive, and 345 to 360, inclusive.

Wendell Berge, Assistant Attorney General.

Service of a copy of this document is acknowledged this 7th day of February, 1944.

William Waller, Attorney for Appellees.

[fol. 3317a] [File endorsement omitted.]

[fol. 3318] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1943.

No. 664

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY, AND DESIGNATION OF PARTS OF RECORD UNNECESSARY FOR CONSIDERATION—Filed February 1, 1944

Appellants, The Crescent Amusement Company, et al, intend to rely upon each of their formal assignments of error, and adopt same as their statement of the points to be relied upon, but for convenience and brevity propose to group the discussion of said points as follows:

1. Plaintiff contended in the District Court that defendant exhibitors (Appellants here) exercised "control" over the licensing of films by the eight major distributors, Paramount, Fox, Warner, Loew's RKO, United Artists Columbia and Universal, and that by the exercise of said control defendant exhibitors were able to and did unreasonably restrain, suppress and eliminate the competition of competitors referred to as independent exhibitors. The District Court did not find or conclude that plaintiff's contentions in these respects were supported by the evidence. Appellants contend that there was a fatal variance between the allegations and the Findings (as well as the [fol. 3319] proof) and that the decree cannot stand for that reason.

2. The District Court found that in several instances a distributor discriminated against an independent exhibitor in the licensing of films. It was found, in effect, that in making deals with a defendant exhibitor rather than with an independent, the distributor was influenced by its desire for the business of the defendant exhibitor in other towns in the circuit, and that the discrimination was therefore the result of coercion on the part of defendant exhibitors. It is the contention of appellants that such discrimination by the distributors would not warrant the conclusion that defendant exhibitors violated the Sherman Act and would not justify paragraphs (8), (12), (13), (15), (16),

(18) and (21) of the decree, even if the complaint had been filed on that theory.

3. It is the contention of appellants that the findings of discrimination should be disregarded in this Court as entitled to no weight whatever for these additional reasons: (1) because they are based almost entirely on incompetent evidence consisting of inter-office memoranda and communications from one employee of a distributor to another employee of the same distributor, and appellants had nothing to do with said communications and were not parties to them; (2) because the findings are copied from plaintiff's brief and hence are entitled to no greater weight than their source, which was an admittedly partisan document. *Process Engineers, Inc. v. Container Corporation of America*, (C. C. A. 7, 1934) 70 F. (2d), 487; *United States v. Forness* C. C. A. 2, 1942), 125 F. (2d) 928.

[fol. 3320] 4. It is the contention of appellants that the Findings of discrimination are contrary to the weight of the competent evidence in the record, and that in these cases of alleged discrimination, the distributor in every instance had a good and valid reason for preferring to do business with the defendant exhibitor rather than the independent, wholly aside from the desire of the distributor to get additional revenue by making a circuit deal.

5. All other questions aside, appellants contend that paragraphs (8) and (12) of the decree are not adapted to carrying out the purposes of the Sherman Act and should be eliminated from the decree. The effect of these paragraphs is to permit distributors to exercise "leverage" on appellants in negotiating film deals, in that distributors are left free to condition the licensing of films in competitive situations upon the agreement of appellants to license pictures in other situations at film rentals and on terms dictated by the distributors. Appellants are deprived of the right to insist that film rentals and terms for competitive situations be agreed upon at the same time that film rentals and terms for other situations are agreed upon. The effect is to aggrandize the distributors at the expense of appellants. In this connection it should be stated that plaintiff evidently had the same view of the matter when the complaint was filed. There was a prayer asking for an injunction against the *distributors*, but not against the

exhibitor defendants. After five of the distributors had been dismissed as defendants, and without any amendment of the prayer, plaintiff at the conclusion of the trial asked for an injunction against the exhibitor defendants which is now found in the decree.

[fol. 3321] 6. All other questions aside, appellants contend that paragraphs (13), (15), (16), (18) and (21) of the decree are harsh and punitive rather than equitable and remedial, and should be eliminated. By these paragraphs of the decree each corporate appellant is required to divest itself of any stock ownership in any other appellant corporation, and also in certain corporations which were not parties to the cause; and Messrs. Sudekum and Stengel are permitted to be connected with only one appellant corporation. It is the contention of appellants that these divestiture provisions of the decree have no tendency whatever to correct any of the evils or supposed evils alleged to exist in the business of exhibiting motion pictures, and would entail a substantial financial sacrifice without corresponding benefit to the public.

7. The District Court held that so-called "franchise" agreements between certain of defendant exhibitors and certain distributors (who were indispensable parties to a suit to invalidate such agreements but were voluntarily dismissed from the case by plaintiff) were illegal and void. In paragraph (1) of the decree, the District Court enjoined appellants from entering into further franchise agreements with said distributors "with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them." Appellants contend that franchises are not illegal *per se;* that it is not a violation of the Sherman Act to have franchise agreements with three distributors at the same time (there being the eight major distributors as well as other so-called independent distributors whose product is [fol. 3322] able to the independent exhibitor); and that the language of paragraph (1) of the decree does not afford an ascertainable standard of conduct. Appellants further contend that there was no allegation in the complaint to the effect that a franchise was in any different category from a one-year deal, and that the decree in this respect is outside the issues in the case and is *coram nonjudice and void.*

Said appellants herewith designate, as considered unnecessary for the consideration of the points on which appellants intend to rely, the following parts of the transcript of the record as certified by the Clerk of the United States District Court for the Middle District of Tennessee on January 27, 1944:

1. Sections I, II and III, being paragraphs 1-17, inclusive, of Exhibit A to answer of The Crescent Amusement Company et al. to supplement to complaint, found at pages 496-505, inclusive.

2. Sections V, VI and VII, being paragraphs 90-187, inclusive, of Exhibit A to answer of The Crescent Amusement Company et al. to supplement to complaint, found at pages 522-562, inclusive.

3. Pages 565 and 566.

[fol. 3323] 4. Pages 1954-1961, inclusive, and pages 1963-2244, inclusive, being exhibits sent up in their original form pursuant to consent order of the District Court.

5. Paragraphs 1-23, inclusive, of motion to strike portions of plaintiff's evidence and exhibits, found at pages 2246-2255, inclusive.

6. Pages 3039 -a-b-c; Pages 3040 -a-b; Pages 3041 -a-b; and Pages 3045-3048, inclusive, being exhibits sent up in their original form pursuant to consent order of the District Court.

7. The following duplications: Pages 326-344, inclusive; Pages 361-389, inclusive; Pages 425-439, inclusive; Pages 470-471, inclusive; and Pages 3297-3299, inclusive.

Documents included in the transcript at pages 3290-3296, inclusive, are in the wrong place: these documents should be included in the printed record immediately after page 3240 of the transcript and immediately preceding the document commencing at page 3241 of the transcript.

George A. Armistead, Jr., William Waller, Attorneys for Appellants.

[fol. 3324] Service of a copy of this document is acknowledged this February 1st, 1944.

Charles Fahy, Solicitor General.

[fol. 3324a] [File endorsement omitted.]

[fol. 3325] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

Nos. 662, 663, and 664

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—February 28, 1944

The statements of jurisdiction in these cases having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the cases on the merits.

Endorsed on Cover: File No. 48,155, 48,156, 48,157. D. C. U. S., Middle Tennessee, Term No. 662. The United States of America, Appellant, vs. Crescent Amusement Company, Rockwood Amusement Company, Cherokee Amusements, Inc., et al. Term No. 663. The United States of America, Appellant, vs. Crescent Amusement Company, Rockwood Amusement Company, Cherokee Amusements, Inc., et al. Enter Geo. H. Armistead, Jr. Term No. 664. Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., et al., Appellants, vs. The United States of America. Filed February 1, 1944. Term No. 662, O. T. 1943; 663, O. T. 1943; 664 O. T. 1943.